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[N.C. Reports]

EQUITY CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

[V. 16]

FROM

JUNE TERM, 1828.

TO

DECEMBER TERM, 1830.

BY THOMAS P. DEVEREUX,
REPORTER, &c.

Vol. I.

SECOND EDITION.

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EQUITY CASES.

DECEMBER TERM, 1826.

Micajah Ricks, and Milberry his wife, Thomas and Teakle Ricks,
vs.
Pilgrim L. Williams and Wilson Taylor, Executors of Rowland Williams.
From Nash.

The same Defendants as Plaintiffs,
vs.
The same Plaintiffs as Defendants.

In a devise of personalty, " to be equally divided between my son P, my daughters D, C, and E, and the heirs of my daughter P," held that the latter take but one-fifth among them.

A petition for a rehearing is the proper remedy against an interlocutory decree.

Rowland Williams, by his will, after sundry specific legacies, devised all the residue of his estate to be sold, " and the money to be divided equally, between my son *Pilgrim L, Williams*, and my daughters *Diana*, *Charity* and *Elizabeth*, and the lawful begotten heirs of the body of my daughter *Priscilla*."

The Plaintiff *Milberry* is the daughter, and the Plaintiffs *Thomas* and *Teakle*, the grandsons of *Priscilla*, and claim to have the residue divided into seven equal parts.

On the Spring Circuit of 1821, his honor Judge *Nash*, by an interlocutory decree, directed the residue to be divided according to the prayer of the bill. A bill of review, and a petition for a rehearing were filed, and the cause stood in this Court upon the original bill and the bill of review, both having been transferred to this Court.

This case was twice argued, viz. at December Term, 1824, and at December Term, 1825, a note of which, the present reporters have been furnished with.

Gaston against the decree.—*Rowland Williams* bequeaths as follows : " I leave the rest of my estate to be sold, and the money to be equally divided between my son *Pilgrim*, and my daughters *Diana*, *Charity* and *Elizabeth*, and the lawful begotten heirs of my daughter *Priscilla*." *Priscilla* was then dead—had left surviving, and who were living at testator's death, a daughter, *Milberry Ricks*, and two grandsons, *Thomas* and *Teakle Ricks*, children of a deceased son.

The decree ordered a division, *per capita*, between *Pilgrim*, *Diana*, *Charity*, *Elizabeth* and *Milberry*, *Thomas* and *Teakle.*

It was erroneous:—

1. If the words "lawful begotten heirs of my daughter *Priscilla*," are sufficiently definite of themselves, without reference to the statute of distributions, to point out the objects of testator's bounty, they designate her *children*, and her two grandsons are not embraced within them.

These words "heirs of the body," or "heirs lawfully begotten of a certain person," when used as words of purchase, and especially in gifts of chattels, are synonymous with "children."

It is so often in dispositions of real property, see *Doe dem. Long* v. *Laning*, (2 *Bur*. 1106), and *Goodlittle* v. *Herring*, (1 *East*. 264.)

It is their established meaning in bequests of personalty. (*Loveday* v. *Hopkins*, *Ambler*, 273—*Jacobs* v. *Amyatt*, 4 *Bro*. 542—*Wilson* v. *Vansittart*, *Amb*. 562—2 *Roper on Legacies*, 402.)

On this point also, I claim the benefit of the opinion of a majority of the Court, in *Whitehurst* v. *Prichard*, (1 *Mur*. 385.)

Where a bequest is made to "children," grandchildren do not take, unless there be *no child*, or the context shews that the word was designed to have a meaning more extensive than properly belongs to it. (See *Loveday* v. *Hopkins*, *Amb. as above*—*Crooke* v. *Brooking*, 2 *Ver*. 106—*Reeves* v. *Brymer*, 4 *Ves. jr*. 692—1 *Rop. on Leg*. 106, 107.)

If the word "heirs" be synonymous with next of kin, it does not, *as such*, take in the grandchildren.

In *every sense* in popular and legal parlance, a child is nearer of kin than a grandchild. (2 *Bl. Com.* 203, 504, 5.)

Grandchildren take as *next of kin*, by statute of distribution, only when there are no children. They take, not as *next of kin*, but by virtue of a capacity bestowed upon them, as *representing* next of kin, whenever there is a child.—(*Toller.*)

This view of the case is consistent with, and perhaps demanded, by a numerous class of adjudications which decide, that when a gift is made by words of *definite description*, such as "children of A. B." the donees take not as representatives, but as designated individuals, as though they had been severally named. (*Blackler* v. *Webb*, 2 *P. Wms.* 383—*Butler* v. *Stratton*, 3. *Bro.* 367—*Wild* v. *Bradbury*, 2. *Ver* 705—*Davenport* v. *Hanbury*, 3 *Ves. jr.* 259.)

2. These words "heirs lawfully begotten of my daughter," may have been used as indicating "persons lawfully representing my daughter." If so, the grandsons take with *her* daughter—but these take as such representatives, and take *one* share only.

The subject matter is *personalty* —therefore, *heirs*, strictly speaking, cannot be meant.

There is a strong analogy between lineal descendants succeeding to the personalty, and lineal descendants inheriting the land of a deceased ancestor.

It is our duty to take the word as nearly to its proper sense as it will admit.

Then it means that *class* of persons who represent her in succession to personalty—who would succeed to her undisposed money and chattels.

This is the opinion of a great Judge. (*Holloway* v. *Holloway*, 5 *Ves. jr.* 402.) So have similar words been understood. *Bridge v. Abbott*, 3 *Bro.* 224.—*Long* v. *Blackall*, 3 *Ves. jr.* 486.)

If this be the meaning of these words, then these "legal representatives" take together an equal share with the persons named.

The statute of distributions directs an equal division among the children of an intestate, and the legal representatives of a deceased child. (*Tollar, & Act* 1766, *ch.* 79.)

The *equality* of division, is as precisely ordered in *this statute,* as in the will under consideration.

Had Taylor made no will, the law would have ordered a division nearly in the words which he has *here* used.

Why should the same words used by *him*, receive a meaning different from that appropriated to them when found in a statute, and deliberately penned.

Is there less liberality shewn in expounding the words of an illiterate man, when *inops concilii,* than of an Assembly representing the wisdom of the community?

If "heirs, &c." be equivalent to "lawful representatives," then they take as *representatives* what would have been given to her whom they represent.

There is no more incongruity in these persons taking under the will, as representatives of one to whom nothing had passed, than in children taking, under a statute, (a general will for intestates,) under one to whom nothing had accrued.

But it is objected, that this construction is forbidden by another class of adjudications, on the words "relations," "kindred," &c.

This class of cases has settled, that such vague words shall be *limited* in their *extent* by the statute, but the division shall be wholly independent of the statute. *Thomas* v. *Hale, Ca. Tem. Talbot* 251—*Greene* v. *Howard,* 1 *Bro.,* 31.

These decisions are wrong in principle; the Court in order to *expound* the will, imply a reference to the statute of distributions. The construction ought, therefore, to have been the same as if this *reference* was expressly contained in the will. If the reference had been expressed "according to the statute of distributions," the statute would have explained the equal division, as well as ascertained those between whom it is to be made.

This is admitted by one of the strongest champions for this doctrine, and most zealous extender of its application, *Mr. Justice Buller*. (*Phillips* v. *Garth*, 3 *Bro.* 68.)

But the present question is not affected by those decisions. The words are either definite in themselves, and require no reference to the statute to limit their generality, or they are of the same *import* with those used in the statute, and in connection with a like context must receive the same interpretation. *Justice Buller* indeed, thought otherwise, (*Phillips* v. *Garth.*) But he was opposed by an authority *at least* of equal respectability, *Ld. Thurlow*, and acknowledged that he was violating an authority greater than either of them, plain good sense.

This view is strengthened by the principle to be extracted from *Wythe* v. *Thurlston*, (1 *Ves. sen.* 196) commented on in *Davenport* v. *Hanbury* (3 *Ves. jun.* 259, 260.) Where there is enough on the will to shew that "children," &c. are used as representatives or substitutes, in common parlance "heirs," of their parent, they take in that capacity, and the share which would have been allotted to that parent.

Badger, in support of the Decree.—Two questions are made upon the residuary clause in the will. 1. Do the grandchildren of *Priscilla*, take with her children under the description "*lawfully begotten heirs.*" 2. If they take, in what proportions.

Court. (After a moment's consultation.) It is unnecessary for you to discuss the first question.

Badger.—It is clear they are entitled *per capita*, by force of the words "equally to be divided," which are equivalent to "share and share alike," and import a tenancy in common.

This has been settled by a series of adjudications, upon expressions exactly analogous to those in this will.

Where the bequest was "equally to son *J.* son *P's* children, daughter *T.* and daughter *W's* children," it was held that all were entitled equally *per capita*, as if severally named. (*Blackler* v. *Webb*, 2 *P. Wms.* 383.)

So where the words were "equally between *R. C. S*, *J. S.* and the children of *M. P.*" "equally between descendants of *T. F.*" and among the descendants of *T. F.* there were children and grandchildren,—held all were entitled *per capita.* (*Butler* v. *Stratton*, 3 *Brown*, *C. C.* 366.)

So "to be divided among next of kin share and share alike." (*Phillips* v. *Garth.*)

In the last case, there was no difference between *Mr. J. Buller* and *Ld. Thurlow*, as to the proportions in which the grandchildren should take, as seems to be supposed by the Counsel on the other side. *Buller* thought the grandchildren entitled—the Chancellor inclined that they were not entitled at all; but if entitled, both agreed that upon authority, they should take *per capita*, though both doubted the original propriety of the decisions.

This is evident from what fell from *Ld. Thurlow*, in *Rayner* v. *Mowbray*, (3 *Brown*, 335.)

It is in vain, that the Counsel allege these decisions to be wrong in principle. Even if wrong at first, they have fixed the law, and cannot, without great mischief, be now overturned. *Ld. Thurlow*, in the last case, said in reference to these very decisions, "where once a rule has been laid down, it is best to abide by it. We cannot always be speculating what would have been the best decision in the first instance."

And this Court, at the last Term, felt the weight of authority to be so great, that they reluctantly decreed a partition *per capita*, under a clause in a will, strongly indicating that an equality of division between the stocks or families and not the persons, was designed by the testatator. (*Stowe* v. *Ward*, 3 *Hawks* 604.)

Taking the words "lawfully begotten heirs" to be equivalent to "next of kin," an argument has been drawn from the statute of distributions, here and in England, to shew that the grandchildren can take only in place of their parent and *per stirpes*. It is supposed that "next of kin" is used in the statute to signify those nearest of blood, and in equal proximity to the intestate. An examination of the statute will shew this supposition to be unfounded. Our statute (a transcript of the English, with only one or two barely literal variations) recognizes the right of representation as existing by law, and of course referring to the descent of real estate, and does not use the words in question, until it comes to provide for a distribution where there are no descendants of the intestate. The words are, "and in case there should be no children, &c." "then one moiety &c." "the residue of the estate to be distributed *equally* to every of the next of kin of the intestate, *who are in equal degree*, and to those who legally represent them."

By adding to the words *next of kin*, the qualifying expression *who are in equal degree*, it is clear the former words did not of themselves import what is expressed by the latter. The Legislature must have supposed, that in their sense of the words, there might be next of kin, some nearer in blood than others, yet all next of kin. For otherwise, the expression added is without use or meaning, it is mere tautology.

But if "next of kin" means those who are themselves nearest of blood, and also those who represent persons deceased, who were nearest of blood, there is a propriety and even necessity, for every word, in order to convey what the Legislature meant.

Dissect the clause—"equally to every of the next of kin." By these words, brothers and sisters, and the children of deceased brothers and sisters, would all have taken *equally* *per capita.* But this was not intended.—Hence the words "who are in equal degree" were added. Had the clause stopped here, brothers and sisters surviving would have taken as being *the nearest in equal degree*, to the exclusion of the children of a deceased brother or sister. But this was not intended, and hence the words "and to those who legally represent them," are superadded; by which the *equality* of distribution is confined to those who are in equal degree; and the representatives of one who was in equal degree, take his equal share among them.

Consequently, where in a will the words "next of kin," or words of equivalent meaning are used, they point out *all* who would take under the statute, and if the words "equally" or "share and share alike" be added, they all take *per capita*, as they would have done under the statute, had the expression been "equally to every of the next of kin" without the explanatory words. The words designate the persons by reference to the statute, and the will fixes the proportion, which is equal to each by force of the words "equally to be divided."

The Court held this case under advisement until this term, when their opinion was delivered by

Henderson, Judge:

I think in principle, this question was decided at the last term, in the case of *Whitfield's* will (4 *Hawks* 393,) for if "heirs," when applied to personal property, mean those who are called by law to succeed to the dead man—they bring with them their representative and collective character—and however the property may be divided among themselves, as individuals composing a body, yet as to others, they are an unit, and make but one person, the representative of their ancestor or *propositus;* and so, whether they take by descent or purchase, it is *designatio personæ*, not *personarum.* I refer to the reasons and authorities in the case of *Stowe* v. *Ward*, (*ante* 67) decided at this term, to support this position throughout; in fact, the cases are, to my mind, precisely alike; the only difference is, in that case it is real property ; in this, it is personal : in either, however, the word "heir" has the same meaning as to its representative and collective character. I am not aware of any authorities, except those cited, and attempted to be disposed of in the case of *Whitfield's* will. That this construction meets the Testator's wishes in this will, I have not a doubt. It is plain from the words, he intended a division by stocks or families—and he could not have used a more appropriate word than "*heirs of my daughter Priscilla*," to call them in as a stock or share. I must again express my regret for the decision in the case of *Whitehurst's* heirs—it cannot be supported.

The decree in this case must be reversed, and an account taken of the money paid under it—and the property mentioned in the residuary clause of *Rowland Williams'* will, must be divided into five equal parts—one of which is decreed to each of the children of the testator, to wit, *Pilgrim*, *Diana*, *Charity* and *Elizabeth*, and one-half of the remaining fifth to *Micajah Ricks*, and the other half of said fifth equally between *Thomas Ricks* and *Teakle Ricks*, and for this purpose, the master will take an account.

There being in this case both bill of review, and a petition to rehear—the bill of review must be dismissed, but without costs—The loose practice in our Courts of Equity rendering it somewhat difficult to ascertain the propriety of using the one or the other—and these proceedings were commenced before the decision in the case of *Jones* and *Zollicoffer*, where the matter was very fully discussed and settled.

DECREE SET ASIDE.

The Attorney-General upon the relation of sundry citizens of Raleigh,
v.
Theophilus Hunter.
From Wake.

Injunctions are not awarded by Courts of Equity for the infringement of doubtful rights, until they have been established at law. But when the right is clear and the injury is irreparable, an injunction will be awarded, although the right has not been established at law.

Where a bill charged that the Defendant's mill dam injured the health of the relators, an injunction was perpetuated, notwithstanding the Defendant had been indicted for the same nuisance, on which there had been a mistrial, and although an indictment was still pending.

The bill charged that the Defendant had erected a mill-dam in the vicinity of the city of Raleigh, that the exhalations from the pond, had rendered the inhabitants unhealthy, and prayed a perpetual injunction.

The Defendant by his answer, denied that his mill-pond had any pernicious influence upon the health of the town, and averred that he had been indicted in Wake County Court for a nuisance in erecting the dam, and that the Jury, upon an attempt to try the indictment, had disagreed, and had refused to find a verdict for the State. That subsequently a *nolle prosequi* had been entered by the prosecuting officer. That the Defendant had again been indicted in the Superior Court, that a trial had been delayed by the State, the Attorney General entering a *nolle prosequi* and ordering new process, and that this last indictment was still pending.

Much testimony was taken and read at the hearing, which it is not necessary to recapitulate, as the Court thought that the allegations of the bill were fully sustained.

The case was argued at June Term, 1826, by *Gaston*, for the Plaintiffs, and *Badger*, for the Defendant; no note of which argument, is in the hands of the present Reporters. At that Term, the final decree was settled;

but from some oversight it was not entered, or the cause reported.

The opinion of the Court was delivered by

HENDERSON, Judge :

We were satisfied beyond a reasonable doubt, that the flowing back of the water as contemplated by the Defendant, according to his own admissions, will create a public nuisance, and that of the worst kind, being one destructive to the health and comfort of the citizens of Raleigh. And we are called on to send the question of nuisance or no nuisance to a Court of Law ; for what ? to inform our consciences ? they are alreadyinformed. And were a Jury to find that it was not a nuisance, in a case of this kind, we should feel ourselves bound to disregard their verdict : for a Jury would require the most satisfactory evidence of the fact, at least they would require a preponderance of evidence, to convict ; with us, under all the circumstances of the case, a *probability* is sufficient. In the first place, the injury is irreparable, the place, the seat of government, where its officers are compelled to reside. These ,hings make a difference between this case and that of a common nuisance. It is true it is a question of the most delicate kind, an interference with private rights, from which all departments of government should abstain, except in cases of necessity. It is, however, a sound political maxim, and one sanctioned by the Courts of Justice of this country, that individual interests must yield to that of the many ; and this is something like the interest of the many, for every individual is in some way or other interested in the welfare of the capital. We refer to the decision of *Bell* and *Blount*, (4 *Hawks*, 384) as an authority to shew the jurisdiction of the Court. Where the right infringed is of a doubtful character, as the right of view over another's ground, there a Court of Equity will order the right to be established at law, before it will grant an injunction, in the mean time, staying the owner of the land from closing up the view ; but here the rights infringed upon, are of a character not in the least doubtful, the health and comfort of the relators, and others for whom they act.

INJUCTION PERPETUATED.

—o—

John L. F. Kirk and others infants by their next friend John L. Kirk,
v.
Josiah Turner, administrator *de bonis non* of Thomas Whithead.
} From Orange.

A delivery of a deed is a parting with the possession of it by the grantor in such a manner, as to deprive him of a right to recall it.

Where a deed was handed to the subscribing witness, as the agent of the grantor, for the purpose of being proved, and was by the agent delivered to the grantor without being proved, held that this was not a delivery.

It seems where a claim is asserted on the part of infants, who have an appearance of right, each party must pay their own costs.

ORIGINAL BILL, the allegations of which, were that *Sarah Kirk*, the grandmother of the plaintiffs, being about to contract a marriage with *Thomas Whithead*, and being desirous of settling her property upon the plaintiffs, applied to one *Snipes* to draw deeds of gift to them for certain slaves. That the deeds were drawn accordingly, reserving a life estate in the slaves to *Sarah ;* that *Sarah* executed the deeds, and that they were attested by *Snipes*, and left with him for safe keeping. That after the marriage was solemnized, the deeds came into the possession of *Whithead*, and were by him destroyed. The bill also alleged, that *Whithead* had notice of all these facts, and had in his life-time, disclaimed all right to the negroes, except a right to their services during his life, and prayed that the deeds might be set up in this Court, and the title of the Plaintiffs protected in the same manner as if they had been regularly registered.

The answer denied all personal knowledge of the transaction, and put the Plaintiffs to strict proof of their case.

Snipes, on his examination, proved that the deeds were drawn by him, signed and attested as alleged in the bill. That after he witnessed them, he was asked by *Mrs. Kirk* if he would be at the next Court, as she wished the deeds recorded, that he replied it was uncertain, and that she had better go and acknowledge them, when the deeds were handed to *Mrs. Kirk*, and had not since been seen by the witness.

Another witness, who was seriously impeached, swore that *Whithead* and his wife, both informed him, that the latter had, before the marriage, given her negroes to the children of *John L. Kirk*, the present Plaintiffs, reserving a life estate to them both.

A third witness testified that he had applied to *Whithead* to buy a negro boy, formerly *Mrs. Kirk's*, and was informed that he could not make a good title to him.

Murphy, Badger, and W. H. Haywood, for the Plaintiffs, cited *Bank of Newbern* v. *Pugh*. (1 *Hawks*, 198—*Shep. Touch*. 58.)

Nash, on the other side, was stopped by the Court.

The opinion of the Court was delivered by

HENDERSON, Judge:

A delivery of a deed is, in fact, its tradition from the maker to the person to whom it is made, or to some person for his use, and if the person receiving it for another, is authorised to do so, it is not only immediately the maker's deed, but it cannot be rejected by the grantee. If he has not authorised the person to receive it, yet it is the maker's deed, until he, for whose benefit it is made, rejects it; it does not wait for the approbation of this person before it becomes a deed; for his acceptance is presumed, until the contrary is shewn. It being for his interest, the presumption is, not that he *will accept*, but that he *does*. Therefore, if there was any evidence, that the deed in question was left with *Snipes*, for the benefit of *Mrs. Kirk's* grandchildren, and was not subject to her control, the delivery to him for the use of the children, would have been complete, and the deed efficacious, notwithstanding his re-delivery of it to her, for the purpose of registration. But the transaction, I think, by no means, bears this aspect. *Mr. Snipes* was called on to write the deed as a settlement, preparatory to the marriage which *Mrs. Kirk* then contemplated: In this, he acted as much in the character of her agent, as that of the grandchildren. His having the paper in his hands might well arise from his relation to her; there were no words showing that *Mrs. Kirk* parted with the possession or control of the paper. The request that he would attend Court and prove the deed, neither shows, that the act, on her part, was intended to deprive her of the control of it, or that the deed was then complete, or that she lost her *locus pænitentiæ*, which it is presumed she intended to retain, at least, until there was something like a certainty of her marriage. In fact, her conduct shews, that it was her intention then, in case of the marriage, to make such asettlement, and no more; at least it does not furnish sufficient evidence, that the transaction to which *Mr. Snipes* testifies, was such an one as to divest her of the property, and vest it in the Plaintiffs, which it must be affirmed to be, before we can set up the deed, and deprive her husband of the property. If this transaction did not divest her of the slaves, it may be asked what did, if there was a conversation in which she stated that she had given the property to her children, if it should be referred to this inchoate intention, it would not pass the property, for we see that this intention had not that effect. It would be unfair to refer it to a parol gift complete, when there is this transaction to which we may refer her words, and with the more certainty, as her conduct in this transaction refutes all idea of a parol gift, for it appears, that if she designed to give, she preferred a written transfer, and had the means in her power of making one.

The declarations of the husband may also be referred to the same attempt; and her conduct afterwards, in not having the deed registered, accompanied by his declarations, proven by a person shewn to be of undoubted credit, is a full exposition of her views throughout, viz. that she intended to act in this particular, in case she was to marry, as she pleased; and if disposed to make the settlement, she might use the deed for that purpose, prepared by one in whose skill and judgment she had confidence. That she did not intend to part with the deed, is supported by the circumstance, that on its face, it is not made to depend on the event of her marriage, but is absolute, which would, from the attempt proved by *Snipes*, if final, deprive her of her property, marriage or no marriage, which I think it is evident she did not design.

The probability is that she intended then to give validity to the deed by some after act, if she married; if not, it was to have no effect. It seems she changed her mind. As this is a claim asserted on behalf of infants who had an appearance of a right, each party must pay his own costs.

BILL DISMISSED.

Thomas Alston
v.
James Maxwell and Willie Perry,
Ex'rs. of Stephen Outerbridge.
From Franklin.

Morality and good faith, require that the vendor should disclose to the vendee every circumstance which may induce the latter to change his mind as to the contract.

Where a trustee sold at vendue *a fee simple* in the trust land, and before the execution of the contract, the trustee and the *cestui que trust*, discovered that the trust deed created only a life estate, held that the concealment of this discovery was fraudulent, and vacated the contract, although the trust deed was publicly read and the trustee only undertook to convey the title he had, and although the *cestui que trust* refused to guarantee the title of his trustee.

Bill for an injunction, the material allegations of which were, that one *Marmaduke Jeffreys* had conveyed a tract of land to *Richard H. Fenner*, in trust to secure a debt due *Outerbridge* by *Jeffreys*. That the deed was defective, first because it was a deed of bargain and sale, and no valuable consideration was recited in it, as having passed from *Fenner* to *Jeffreys*. Secondly, because there were no words of inheritance in it, and at the most it conveyed only a life estate to *Fenner*. That both *Outerbridge* and *Fenner*, his trustee, had express notice of these defects, having been informed of them by two gentlemen of the profession; and that they fraudulently sold the land at vendue, without disclosing the defect in the title of *Fenner*, when the Plaintiff became the purchaser, and gave his bond for the pur chase money. It was admitted in the bill, that by th terms of sale, the trustee was only to convey the title which he held under the deed from *Jeffreys* and that *Outerbridge* had refused to warrant the title of his trustee; but it was insisted that this was intended to apply only to the original title of *Jeffreys*, or to his estate in the land, at the date of his deed to *Fenner*, and not to the quantity of estate conveyed by *Jeffreys* to *Fenner*. In proof of which, it was averred that the land was sold as a fee simple, and that the deed from *Fenner* to the Plaintiff, was properly drawn to convey a fee, if *Fenner* had one.

It was also admitted, that the deed from *Jeffreys* to the trustee, was publicly read when the land was sold, but the Plaintiff insisted that from his ignorance of the forms prescribed for conveyances, he was not aware of the defect at that time, nor did he become so until after the contract was executed. The bill prayed an injunction upon a judgment obtained on the Plaintiff's bond for the purchase money, and general relief.

The Defendant in his answer, denied all fraud, and insisted that the Plaintiff had bought with a full knowledge of the limitations in the deed to *Fenner*.

He also averred that he was informed by his Counsel, who drew the deed from *Jeffreys*, that although it was informal, yet that it conveyed a fee simple in the land; this was fully supported by the testimony of his counsel, *Mr. Person*.

A witness, *Mr. Johnson*, proved that he had informed both *Outerbridge* and *Fenner* after the sale, but before the execution of the deed from *Fenner* to the Plaintiff, and before the latter gave his bond for the purchase money, of the defects in the deed to the trustee.

The case was argued at June Term 1826, the *Attorney-General*, *Seawell*, and *Badger*, appearing for the Plaintiff; and *Gaston*, for the Defendant; no note of that argument is in the possession of the Reporters.

HENDERSON, Judge.—I accord with my brethren in saying that this contract should be set aside on the ground of fraud; it appearing from unquestionable evidence, that both *Outerbridge* and his trustee *Fenner*, knew before the title passed, and before the Plaintiff gave his bond, that the trustee could rightfully make but an estate for his life, such being only the extent of his own estate; notwithstanding the repeated declarations made both by *Outerbridge* and his trustee at the sale, that only such title as the latter had, was offered for sale, and the reading the deed aloud to shew what that title was, that the bidders might judge for themselves. It is evident that this was understood to relate to the title, and not the quantity of estate in the lands, and that a fee simple was offered for sale. Morality and good faith should have induced the Defendants *Outerbridge* and *Fenner*, to disclose to *Alston*, when about to take his bond, the discovery which had been made, for they certainly knew that such information, would have produced a total change in his intentions; and that *Outerbridge* was about to get from *Alston*, the full value of an estate in fee simple, which he knew that *Alston* thought he was acquiring, when an estate only for *Fenner's* life was conveyed to him. Upon strict principles of law, even if *Outerbridge* and *Fenner*, were really ignorant of the quantity of estate in *Fenner*, yet as they professed to sell and did contract to sell an estate in fee, I doubt whether they have in reality, complied with their contract, or conveyed to *Alston*, that estate which they had contracted to sell.—*Fenner* had but an estate for life, and could by estoppel only convey a larger estate. By a reference in his deed to *Alston*, *Jeffreys* deed to him became part of the deed to *Alston*. Thus the matter was left at large, there being estoppel against estoppel.

But relief being clear upon the ground of fraud, I give no opinion upon this latter point.

HALL, Judge.—It may be taken for granted, in this case, that it was the understanding of the parties, that a title in fee simple in the lands, was conveyed from *Jeffreys* to *Fenner*, the trustee. This was the understanding of *Person*, who drew the deed of trust; but it does not appear that the defendants were undeceived in regard to that, before the sale of the land to Complainant.

Person states, that after the execution of the deed of trust, he drew another, and recommended to *Outerbridge*, to have the last executed, asit was drawn more fully than the first, though he believed the first was sufficient for all the purposes for which it was given.

However, it seems, that after the sale, but before *Alston* had executed his bond to *Outerbridge*, and before *Fenner* had executed the deed to *Alston*, *Johnson*, the attorney who drew the deed, informed both *Fenner* and *Outerbridge*, that nothing except a life estate was conveyed by the deed of trust from *Jeffreys* to *Fenner*.

It is true, *Outerbridge* refused to warrant the title of the land to the Complainant, but that was a fee simple title in *Jeffreys*, for such it was apprehended was conveyed from *Jeffreys* to *Fenner*. The ground of refusal was, that *Jeffreys*' title in fee simple might not be good, not that he had conveyed a title less than a fee, or any title less than he had

When *Fenner* and *Outerbridge* were informed by *Johnson* that only a life estate was conveyed to the former, they were apprised of an important fact relative to the title, to which *Alston* was a stranger---this fact they concealed; by doing so, they practised upon *Alston* that which the law pronounces to be a fraud, and that at a time when they were not in a worse situation than they stood in before the sale, or, indeed, as far as it appears, at any time after the execution of the deed of trust.

I am therefore of opinion that the injunction should be made perpetual.

Taylor, Chief-Justice, concurred.

INJUNCTION PERPETUATED.

Jonathan Cheshire, *v.* George Booe, Administrator of Thomas Garrawood, and the distributees of said Garrawood.	From Rowan.

It seems that fraud practised by *cestui que trust*, will avoid a sale honestly made by the trustee.

ORIGINAL BILL, the allegations of which were that the Plaintiff had purchased of the Defendant *Booe* a negro girl, belonging to the estate of his intestate. That the negro, at the time of the sale, was laboring under a mortal malady, of which she soon after died. That the Plaintiff was not aware of her ill health at the time of the sale, or at the time he paid the purchase money, charging that if the Administrator had no notice of the unsoundness of the negro, the fact was well known to the widow of the intestate, and to his children, who had concealed the defect, and used many means to induce the Plaintiff to purchase. The bill prayed that the purchase money might be refunded to the Plaintiff, and he be indemnified for the charges he had been at in taking proper care of the negro.

The Administrator, by his answer, denied all knowledge of the negro's unsoundness, and stated, that when applied to by the Plaintiff, at the sale, on this subject, he referred to one *Glascock*, who was present, and had hired the girl the year before.

The answer of the widow of the intestate, which was referred to by that of the children, denied any fraudulent concealment, and averred, that the girl, although she had been unwell the year before the sale, was, to the best of her judgment, healthy at the time of the sale.

The proofs read at the hearing were very voluminous, but it is not thought necessary to repeat them.

No Counsel appeared for the Plaintiff in this Court---*Murphy* and *Nash* for the Defendants.

The opinion of the Court was delivered by

HALL, Judge:

Taking it for granted, that fraud in the *cestui que trust*. will avoid a sale honestly made by the trustee, and therefore assuming it as a duty to look into the testimony in this case, I have examined the depositions, and am of opinion, that it is altogether unnecessary to give the evidence in detail—much of it is irrelevant, some little of it seems to throw a suspicion upon *Mrs. Garrawood*, but by no means sufficient to establish such a fraud, as would entitle the Plaintiff to relief. It seems to be clearly established, that the negro girl in question was a healthy one, until she was hired out to *Glascock*—during that year, it seems, she was somewhat sickly—some part of the time she was with *Mrs. Garrawood*, particularly a few days before she was sold; but it does not appear that *Mrs. Garrawood* had knowledge of her complaint and concealed it. Indeed, it does not appear what was the nature of the complaint she died of, or what her complaint was when she was sold. I think the bill should be dismissed with costs, except as to *Mrs. Garrawood*, who must pay her own.

BILL DISMISSED.

——o——

Robert H. Wynne and Susan his wife
v.
Peyton R. Tunstall.
From Halifax.

In a partition under the act of 1787, a charge of money upon the more valuable dividends for equality of partition is a *legal* charge upon the *land*, and follows it into the hands of a purchaser for valuable consideration without notice.

Money thus charged is realty as much as the land for which it is the substitute; and where it was allotted to the share of a feme covert and the husband had taken a bond and given a receipt for it, held that the husband and wife could recover the amount for her use.

THE BILL charged, that the Plaintiff *Susan*, was entitled to one-eighth of a tract of land in Northampton County, as tenant in common in fee-simple, with seven other persons. That a petition for partition thereof, was filed in Northampton County Court, and after proper proceedings had, a partition was returned, whereby lot number five, was assigned to the Plaintiffs, in severalty, valued at 5,500 dollars, that the value of each share was \$6,547 62½: that for equality of partition the sum of \$1047 62½, was added to the share drawn by the Plaintiffs, and was charged upon lot number seven, in the partition, which was drawn by one *Marmaduke N. Jeffreys*. That *Jeffreys* had never paid the said sum of \$1047 62½, but was utterly insolvent, and had sold his share to the Defendant, *Peyton R. Tunstall*, who had, at the time of his purchase, notice of the charge thereon, in favor of the Plaintiffs. The bill prayed general relief, and also specialty that the land drawn by *Jeffreys*, and conveyed by him to the Defendant, might be sold by order of the Court, for the purpose of paying the sum of money due to the Plaintiffs for equality of partition.

The Defendant, by his answer, admitted the partition and charge as set forth in the bill, and that he had notice of the charge upon the lot drawn by *Jeffreys*, at the time of the partition. But he stated that he purchased that lot of *Jeffreys*, on the 22d of September, 1817, that the partition was made in December, 1814, and he supposed that *Jeffreys* was obliged, at the time of the partition, either to pay or secure the sum charged upon it, and that it had accordingly been paid or secured. He therefore denied, that he had any notice of the claim of the Plaintiffs at the time of his purchase, and insisted that he was a purchaser for a valuable consideration.—He also averred, that the Plaintiff *Robert* well knew of the negotiation for his purchase from *Jeffreys*, from its commencement to its close, and fraudulently or negligently concealed his claim upon the land. That *Jeffreys* continued solvent, until December 1819, and that the claim of the Plaintiffs as now urged, was not asserted until June, 1820, and that had he received earlier notice, that his land was held subject to the

Plaintiffs' claim, he might have paid it and procured an indemnity from *Jeffreys*. The Defendant also charged that the Plaintiff *Robert* had in November 1819, settled with *Jeffreys* for this claim, had taken the negotiable security of *Jeffreys* for the amount thereof and given a receipt therefor, and thereby had elected to consider it as a personal demand upon *Jeffreys*. The Defendant therefore insisted that the Plaintiffs were barred of all equity, either by the fraudulent concealment of their claim; by their latches in not asserting it, whereby the Defendant was deprived of all opportunity of procuring a counter security, or by their election, to consider the amount as a personal demand against *Jeffreys*.

The Plaintiffs by an amendment, admitted that the Plaintiff *Robert*, had taken the bond of *Jeffreys*, as set forth in the answer, but averred that he had done so only in the hope of receiving satisfaction from *Jeffreys*, in which he had been disappointed, and denied that he had received payment of said bond, either from *Jeffreys* or by negotiating it.

There was evidence taken on both sides, but it did not materially vary the facts as presented by the bill and answer, and a recapitulation of it is not deemed necessary to the elucidation of the case.

At the hearing before Judge Donnell, on the fall circuit of 1825, his honor decided that the Defendant had notice of the charge, and decreed that he should pay the sum of $1047 62½, charged upon lot number seven, with interest thereon, into the Master's Office, for the use of the Plaintiff *Susan*, in such manner as the Court might direct, and that each party should pay their own costs. From which decree, the Defendant appealed.*

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*In the reports of Equity Cases, whenever the manner in which they are brought up is not mentioned, the reader will consider that they were removed under the act of 1818, sec. 5th.

The case was argued at June Term 1826, by *Gaston* and *Hogg*, for the Appellant, and by *Badger*, for the Plaintiffs.—The Reporters have only an imperfect note of that argument.

For the Appellant it was insisted,

1. That the sum charged for equality of partition, if in any view a lien, was a legal one, and could be enforced by an execution founded upon the final judgment in the petition for partition; (*Revised Code, ch.* 274, 558,) and therefore the Plaintiffs had mistaken their forum.

2. That supposing an equitable lien to exist, the Defendant was not affected with notice of it; he did not know that a lien existed; he only knew that there was an inequality in value; and notice to affect the conscience of a purchaser, must be notice of a subsisting demand. (1 *Brown C. R.* 301—2 *Do.* 380—4 *Wheaton* 294—15 *Ves. jr.* 329—1, *John. Chan. Rep.* 308.)

3. That the equity of the wife was no higher than that of the husband, and whatever affected his equity, equally affected hers; for the act does not provide that the sum charged for equality of partition, shall retain its character of realty—as it does in sales for the purpose of division. And whenever realty is turned into personalty, by a judicial sale, there being no provision to the contrary, it assumes the character of personalty. (*Exparte Bromfield*, 1 *Vesey jr.* 443—*Mondey* v. *Mondey*, 1 *Vesey & Beam*, 223—*Mills* v. *Dennis*, 3 *Johns. Cha. Rep.* 367—*Ambler*, 417—*Do.* 706.)

4. The doctrine of equitable liens, as now existing in England, did not obtain there at the period of the Revolution.—(*Ambler*, 724—1 *Brown C.* 420.) It is founded upon the fact, that lands, in England, cannot be sold for debt. The policy of our law is quite different—our laws respecting registration render it inapplicable. In England, the rule has produced great confusion, and many of the States in this country have refused to adopt it. (15 *Vesey jr.* 324—4

Wheaton, 364—1 *Dess. Chan. Rep.* 502—*Wheaton*, 527 —1 *John. Chan. Rep.* 308.)

5. This Court is not precluded from looking into the evidence taken in the cause, and revising the decision thereon. An appeal in Chancery carries up the whole case as to the facts and the equity arising from them.

6. That the bond of *Jeffreys* taken by *Wynne*, and the receipt given for the sum charged for equality of partition, discharged the lien, as thereby the nature of the debt was entirely altered. (2 *Vesey jr.* 543.)

It was contended on the other side,

1. That this Court could only decide upon matters of law; matter of fact, as well as matter of discretion, are not subject to its revision. This Court was therefore bound by the decision of the Court below, upon the fact of notice.

2. In Equity, the vendor has a lien for the purchase money, whether he has taken a security for it or not.—It exists from the presumption of natural Equity, that no one will sell his land, and rely upon a *promise* for payment. A receipt being given for the purchase money, can make no difference, if the vendor has not actually received it.

3. The only question is, had the Defendant notice of the charge. He certainly had constructive notice, for the partition is one of his title papers.

4. That the Acts of Assembly made the sum given for equality of partition, a charge upon the more valuable dividends. It is a specific lien upon the land, in whosesoever hands it goes, similar to the case of a rent given for equality of partition. (*Littleton*, *Sections* 252, 253—*Gilbert Tenures*, 104, 105, *Coke L.* 196, *b.*)

5. This is a specific lien, and the land is liable, although the Defendant had not notice; for a specific lien is a charge upon the *land*, not upon the *estate* in the land, and follows it forever. The rule as to purchasers without notice, applies only to trusts—not legal rights.

Hall, Judge, delivered the opinion of a majority of the Court:—

The act of 1787, (ch. 274,) authorises the County Court to make division of the estates of intestates, and the Commissioners appointed by the Court for that purpose, are empowered to *charge* the more valuable dividend or dividends, with such sum or sums as they shall judge necessary, to be paid to the dividend or dividends of inferior value, in order to make an equal division.

I think the lands on which such sums are charged, are not only securities for the monies so charged, but are themselves the debtors. This appears to be just and fit, in a case where partition is made of lands between persons possessed of no other property. The law cannot contemplate the injustice of taking property from one person and giving it to another, without an equivalent, or a sufficient security for it.

The Act above spoken of directs "the Commissioners to make a return of their proceedings and appropriations, &c., to the Court by which they were appointed, which return and appropriation shall be certified to the Clerk, and enrolled in his office, and registered in the office of the County, where such land, &c., respectively lie; and such return and appropriations, shall be binding among the claimants, their heirs," &c.

This act also directs the money so charged, to be paid in twelve months after such return made.

A subsequent act, passed in the year 1801, (ch. 588,) gives further time to minors; but the validity of the appropriations made by the Commissioners, does not depend upon the payment or non-payment of the monies charged upon the larger dividends.

The Defendant, in his answer, admits, that at the time he made the purchase, he knew that the charge on the land once existed, but he believed that it had been paid or settled. Whether he had express knowledge of that fact, or not, I think is immaterial, for the debt was a legal charge upon the land—and the fact of its existence was so blended and interwoven with the title to the land, that he could not enquire into, and examine the title, without perceiving it, for *Jeffreys* claimed directly under the partition and appropriation made by the Commissioners.

It is argued also for the Defendant, that this debt was discharged by the receipt given by *Wynne*, in the year 1819, in which it is stated, in substance, that the account is settled, and a bond taken for it.

This was no discharge of the debt, which is a legal and express charge upon the land; but what is conclusive, is, that the receipt was subsequent to the purchase by the Defendant—besides, he was not a party to it.

In point of fact, I think it a hard case upon the Defendant. *Wynne* has certainly been guilty of neglect—but *Mrs. Wynne* is the meritorious claimant, and the debt, when recovered, ought to be secured for her benefit.

HENDERSON, Judge, dissented, but filed no opinion.

The following is the substance of the Decree in this cause:

Declare that the sum of $1047 62½, allotted to the Complainant *Susan*, was an express charge upon the land allotted to *Marmaduke N. Jeffreys*, to which the said *Susan* was entitled, in the same manner, as to the real estate, in lieu of which the same was charged, and that her right thereto was not affected by the receipt given by the Plaintiff *Robert*. Declare, further, that the Defendant purchased with notice of the right of *Susan*, and that the lands passed, subject to the charge for the said sum, and continue liable therefor. Declare, that the Defendant pay into the office of the master, the said sum, with interest from the 1st April, 1816, and the costs of this suit, and in case of default, that the master sell, &c. Declare, also, that the Defendant, as well as *William Dogget* and *William Wooten*, securities for the appeal to this Court, are personally liable to the Plaintiffs, for the payment of the money above-mentioned, and the Plaintiffs may, at their election, have execution against the Defendant and his sureties, or rely upon a sale of the land, &c. And let the said sum be held subject to be secured to the Plaintiff *Susan*, according to the directions of this Court—and retain the cause for such directions.

—o—

John Nesbit,
v.
John Brown, Ex'r. of Hugh Montgomery. } From Rowan.

A bill should contain only a statement of facts on which the Plaintiff's case is founded, not the evidence of those facts; therefore, when lapse of time forms no bar to the claim asserted, but only raises a presumption of *fact* inconsistent with it, the lapse need not be accounted for in the bill.

It seems, in such cases, that the lapse of time should be relied on, in the answer, as a defence.

When one sells the land of another, setting out the title of the latter, and covenanting against it, no estate passes by the deed, and a second vendee cannot sue at law, in his own name, on the covenants.

When a vendor covenanted, in case of eviction, to pay double the purchase money, and also all damages, held this to be a penalty, not stipulated damages, and the purchase money and interest only could be recovered.

The original bill was filed in 1803, and alleged that one *Andrew Cranston*, in February, 1758, conveyed to *Mary Montgomery*, the daughter of *Hugh Montgomery*, a lot in the town of Salisbury. That *Montgomery* and his wife, in April, 1762, in consideration of sixty pounds, conveyed the lot to one *William McConnell*, with covenant of quiet enjoyment, against the claim of *Mary*, and for further assurance from her, and also "that in case the said *Mary*, her heirs or assigns, should at any time thereafter enter into the said bargained premises, so as to dispossess the said *William*, his heirs or assigns, that the said *Hugh*, and *Mary* his wife, their heirs or assigns should return and pay back double the purchase money with interest, and all damages that the said *William*, his heirs and assigns may suffer thereby," The bill then averred that *McConnell*, in August, 1762, conveyed the lot to the Plaintiff, who took possession thereof; that *Mary Montgomery* not only refused to assure the title of the Plaintiff, and had died without so doing; but that *Anthony Newman*, who intermarried with her, had by course of law, turned him out of possession. That *McConnell* died insolvent and without personal representatives, and that *Hugh Montgomery*, died in 1778, leaving the Defendant his executor. The bill prayed general relief, and that the Plaintiff might recover of the Defendant, the price of the lot.

The facts as set forth in the bill, were not varied either by the answer or the testimony; from the latter, it appeared incidentally, that the Plaintiff had sued at law upon the covenants in the deed to *McConnell*, and that the suit was decided against him as late as the year 1800, (vide *Taylor's Reports* 82.)

Murphey and *Nash*, for the Plaintiff.

No Counsel appeared for the Defendant in this Court.

Henderson, Judge.—When this cause was first opened, I thought that the great length of time which elapsed after the eviction, before the filing of this bill, formed a bar; but on reflection, I am satisfied that it does not. Lapse of time is matter of defence; and in cases such as this, where lapse of time is of itself no bar, but affords a presumption only, of a fact which is a bar, it is not cause for demurrer; but in cases where lapse of time of itself forms a bar, as in cases where the statute of limitations may be pleaded, then it is cause for demurrer, according to the late English decisions, recognised *arguendo*, in this Court, in the case of *Falls* v. *Torrance*, at the last term. For, as *Lord Thurlow* says, the bill should contain the facts, not the evidence; and the reasons why a suit has not been sooner brought in evidence to repel the presumption of fact, which forms a bar, and which arises from such omission. The Defendant, if he intended to rely on the lapse of time as a ground of defence, should have insisted on it in his answer. The Plaintiff would then have been prepared to repel it, if he could, and the Defendant having omitted to make that defence, affords reason to believe, that if made, it could have been repelled.

The only other objection is, why did not the Plaintiff sue on his covenant at law ? The answer is, that he could not sue in his own name, for in *Montgomery's* deed to *McConnell*, it is stated that the lot belonged to his daughter ; and there being affirmation against affirmation, estoppel against estoppel, no estate passed to *McConnell* by the deed of bargain and sale. The covenants in the deed were therefore mere personal covenants with *McConnell*, not annexed to any estate, and did not pass to *Nesbit* by *McConnell's* deed to him, as was decided many years ago, at Salisbury, by the Chief-Justice, in an action brought on this very deed. (*Nesbit* v. *Montgomery's Ex'r. Taylor's Reports* 82.)

Nesbit's only remedy, therefore, was in this Court, for *McConnell* became *Nesbit's* Trustee, as to those covenants, when he conveyed the land to him, and in equity, *Montgomery* was bound to fulfil them to him. As to the agreement to restore double the consideration in case of eviction, we must look upon that as a penalty only, if for no other reason, than the one that is expressed in the deed, to wit: that *Montgomery* shall also pay, over and above double the consideration, all damages which *McConnell* might sustain upon, or on account of an eviction. There is no pretence, therefore, to say, that the parties have agreed on a sum as liquidated damages contrary to their express agreement, besides liquidated damages are favored no where, and less in Courts of Equity than elsewhere.

The Master will therefore take an account of the principal and interest, from the time the consideration money was paid to the present time, making the sum mentioned in the deed the amount of principal, and adding 25 per cent. to equalize the proclamation money to our present currency. He will also take an account of assets in the hands of the Defendant. As great lapse of time has taken place, the Master may state any fact, which, in his opinion, may tend to diminish the interest, or which the parties may desire, he will also deduct the war interest.

Taylor, Chief-Justice.—This Bill seeks to recover a compensation from the executors of *Montgomery*, for the breach of a covenant, contained in a deed made by him to *McConnell.* in the year 1762, for a lot of land in the town of Salisbury, which lot *McConnell* afterwards sold to the present Complainant, who claims the benefit of the said covenants as assignee. A great lapse of time has taken place since a breach was committed, and the delay is not accounted for in the bill; but as this lapse is not relied upon in the answer, nor was insisted on at the hearing; and as the printed report of the case at law between the same parties, upon the same covenant, compared with the time of filing this bill, shows that the Complainant has been engaged nearly the whole of the time since 1773, in asserting his right, and that he failed at law, because his legal title as assignee was imperfect, we may proceed at once, to a consideration of the case upon its real merits.

The covenant contained in *Montgomery's* deed, so far as it affects the question to be decided, is, in these words, " and further, it is hereby covenanted, premised and agreed by the said parties hereunto, that in case the said *Mary Montgomery*, her heirs or assigns, shall at any time hereafter, enter into the hereby bargained premises, so as to dispossess the said *William McConnell*, his heirs or assigns, or break, determine or nullify, or make void the hereby bargained premises, that then the said *Hugh Montgomery* and *Mary* his wife, and their heirs or either of them, shall return and pay back double the purchase money with interest, and pay also for all damages unto the said *William McConnell*, his heirs or assigns, whatsoever they may suffer thereby."

If the Complainant could have recovered at law, and no fixed sum had been agreed on in the deed, the measure of damages would have been the purchase money, viz. sixty pounds, with interest from the 25th of April, 1762 ; and if a recovery had been made according to the sum agreed upon in the deed, viz. double the purchase money and interest, I conceive a Court of Equity would have relieved upon payment of the first sum. Whatever difficulty there may be in ordinary cases to distinguish between a penalty and liquidated damages, the terms of the covenant have here clearly ascertained that sum to be a penalty ; for double the purchase money is not to be repaid as the probable estimate of damage, *McConnell* or his assigns, might sustain by an eviction, but it is to be paid in addition to all damages. The parties have not therefore left it to interference or construction, but have fully expressed, that the sum is to be paid as a penalty upon *Montgomery*, for not performing his covenants. Under this view, there must be a decree for the Complainant for the purchase of money, with interest from the date of the deed, and the costs of the suit.

DECREE ACCORDINGLY.

John Morehead *v.* Eustice Hunt, Isaac Medley, Matthew Clay, Leonard Claibourn, Edward Pannell, and Thos. Rawlins.	From Rockingham.

The employment by the vendor of bye-bidders, to enhance the price at an auction sale is a fraud, for which, equity will set aside the contract on a bill filed by the purchaser at such a sale.

The bill alleged that Defendants purchased a tract of land lying in the County of Rockingham, on Dan River, on which they laid off a Town, to which they gave the name of Jackson, and divided the same into lots, that they advertised the sale of the lots in the Lynchburg Press, and in other printed advertisements, both in North Carolina and Virginia, in the month of March, 1818, in which they stated that said town was at the head of navigation, that it possessed advantages which no other town on the Roanoke could possess, having immediately in its vicinity an inexhaustible bank of pit coal, an extensive quarry of excellent slate, and a number of excellent sites for mills and other water works. That *Hunt*, one of the partners, and agents of the others, represented to the Plaintiff, and induced him to believe, that the Company would erect a bridge across Dan River, at Jackson, that the President and Directors of the State Bank of North Carolina, had promised the Company to establish an agency in the said town—that the Company had extensive funds, which they would employ in giving commercial importance to the place, and that most if not all these representations were made when the said *Hunt* and Plaintiff were alone, or when only some of the Company were present. That Plaintiff confiding in the representations made by the Company, in their advertisements and those made by *Hunt*, did on the 15th of April, 1818, at public auction, bid off three of said lots, to wit: No. 22 at $1305, and Nos. 30

and 50, at the sum of $875, amounting to the sum of $2180, for which he gave his bonds, payable in two annual instalments, the one payable 25th December, 1818, the other 25th December, 1819.. The bill further alleged, that Plaintiff was informed, confidently believed, and expected satisfactorily to prove, that at the auction of said lots, when he had the said three lots cried off to him, that *Thomas Rawlins*, one of the Company, bid for six or eight lots, and that three or four were cried off to him, but whether he was actually a partner at that time or became so on that day of sale, he did not know. He had also been informed, believed, and expected to be able to prove satisfactorily, that the Company had many other bye-bidders or puffers, among whom was one *Paxton*, of Danville Virginia, who bid several times against him. That the Plaintiff was unacquainted with the situation and advantages of said town, and that he purchased entirely upon the confidence which he had in the representations of the Company, in their printed advertisements, of their copartner and agent *Hunt*, and of the bye-bidders, believing them to have been honestly and *bona fide* made; but that most, if not all the material representations made by the Company, and by their copartner and agent *Hunt*, were untrue, that Jackson was not at the head of navigation, the river being equally susceptible of navigation for thirty miles higher, as it was to that place, that it possessed none of the advantages represented, that there is no coal whatever in the place or its vicinity yet discovered.

The bill then stated a recovery effected at law for the purchase money, and prayed that the Plaintiffs at law might be perpetually enjoined, &c.

The Defendants, by their answers, admitted the purchase by them of the site of Jackson, the sale of the lots—that they had advertised as usual to give publicity—but they each denied, in substance, the fraudulent representations charged in the bill, and insisted that the Plaintiff was better acquainted with the natural advantages of the site and of the river, than they, and purchased upon his own judgment—but alleged the existence both of Coal and Slate in the vicinity of Jackson—they denied the employment of puffers, alleging that the purchases made by *Rawlins* were not for the benefit of the Company, and that *Paxton* was not employed to bid by them.

Proofs having been taken, and the cause set for hearing in the Court of Equity below, it was transmitted here.

The printed advertisement referred to in the bill stated,

That Jackson was situated opposite the Eagle Falls on Dan River, above which, the River was not navigable; that it possessed advantages that no other town on the Roanoke could possess, being at the upper point of navigation, and having immediately in its vicinity an inexhaustible bank of excellent Pit Coal, and an extensive quarry of Slate, and the Eagle Falls possessing many excellent sites for mills and other water works—that commercial houses were erecting for the transaction of business to a considerable extent, and that it was hoped or expected that a share of Bank Capital would be deposited there.

On the hearing, many depositions were read, of which the following alone are material:

Stokely F. Foster deposed, that he was upon terms of intimacy and familiarity with the Defendants—that sometime in the spring of the year 1818, most of the Defendants associated themselves together, and generally passed under the denomination of the "Jackson Company," each contributing to one common stock, the sum of $500 or $1000—they frequently made excursions up the Roanoke, for the purpose of fixing on a site for a town, and ultimately concluded to establish one at the "Eagle Falls"' on Roanoke, to be called Jackson. The motives of the Company for selecting this location were made known to deponent, and were two—first, that the Company were interested in the town of Danville, Va., also on Roanoke, which was likely to suffer from the expected competition of "Leaksville," another town about to be erected near it, and from which they wished to direct public attention, by fixing it on Jackson—secondly, that they were actuated by considerations of a speculative nature. The deponent was employed by one of the Company to go to Lynchburg, Va. to advertise in the public papers the sale of lots, and to procure and post up handbills, specifying the day of sale, and enumerating the advantages attending "Jackson"—among other things, those advertisements extravagantly asserted, that Jackson was well calculated as a repository for produce, and that it would eventually supersede Danville. This deponent frequently heard one of the Company boast of his great influence in gaining their project friends, and appeared particularly pleased that he had prevailed on the Plaintiff (*Morehead*) to enlist in their cause. That about the time the sale was advertised, one of the original Company (who is not a Defendant in this case, and who withdrew from the Company) expressed great dissatisfaction at the manner in which they were proceeding, and by so doing incurred the displeasure of most of them, so much so, that they were frequently heard to say that they were resolved to get clear of him, and finally effected their determination—his place was supplied by another, and the Company was increased by the accession of one or two, all of whom constitute the present Defendants. This deponent also said, that about the commencement of the sale of lots, the Company caused to be made a brilliant display of goods and groceries, which they had previously prepared and arranged on the spot, and that they kept boats continually plying and bugles continually winding on the river that flowed adjacent. That one of the Defendants said to this deponent, "that their plans had taken so well, that even those who had determined not to buy, were alarmed for fear that they could not refrain from buying. The deponent further said, that he was not present at the sale of the first lot, but heard several of the defendants say, that it would go high, as an example by which the sale of the others might be governed—that when he went up where they were selling the second lot, he enquired who bought the first, and was told that it was purchased by *James Conner* for the sum of $700—it was also publicly said by Defendants, that *Conner* was purchasing for gentlemen in Lynchburg. Several of the Defendants also said, that the lots were going too low, and that *Conner* had refused $1500 for the one purchased by him. Deponent also heard much about a Bank Agency, and in a reservation of certain lots, one was pointed out as being intended for a Bank. This Deponent bought two lots, but was advised by one of the Defendants not to buy any more, saying, "You know the Company and their plans as well as I do, and that they say a great deal more than they ought." One *John A. Sims* was very active, bid very frequently, was openly encouraged by the Defendants, and promised, that if he would be industrious, he should have a lot at his own price—a lot was afterwards cried out to him for $600, but he was permitted to take it at $250, for which sum only he executed his bond. In the course of the sale, several other lots were bid off by *Sims*, but he executed only one bond, as above mentioned. Some of the Company seemed much displeased at this, but others said that his services had been worth more to the Company than five lots. This witness further deposed, that since the sale, he heard one of the Company ridicule the surprising simplicity betrayed by the people, saying, that they were the most complete fools he had ever seen, that he had made them believe he was Christ himself, and had really induced old *Morehead* to think, that in one month the city of Norfolk would be deserted by all its enterprising merchants, and that they would be transplanted in Jackson.

James Conner, who is mentioned in *Foster's* evidence, deposed, that he was authorized and requested by the Company to run the first lot as far as $1000—that it was cried out to him at $700—that he was not empowered to bid for any other persons than the Company—that he frequently heard the Company assert that he had been offered $1500 for the lot he bid off—that he had received no such offer; and that if he had, and the lot had been his, he should certainly have taken it. This deponent frequently heard the Company say, that they intended to invest a large amount of capital, and carry on an extensive business—that they were very active in persuading the people to buy—said they intended to erect several large merchant mills, &c. This deponent was well acquainted with all the Company, but one—that it was not known by any but the Company who he purchased the lots for in reality until after the sale—that it was said by the Company publicly, that there was a plentiful supply of Pit Coal and Slate, convenient to Jackson—but that it is now generally said, and this deponent believed truly, that there is neither.

It was in evidence that some of the Defendants represented that they had offered to a *Mr. Galloway,* seventy-five thousand dollars for a tract of land opposite to Jackson, this was contradicted by the deposition of *Mr. G.* It was also proved that Defendants asserted their intention to erect a bridge, and vest 80 or 100 thousand dollars of their capital at Jackson, to give commercial importance to the place, that one of the Company would reside there and that they would stake their last shilling upon its prosperity. It was also clearly shown that none of these things had been done.

It also appeared in evidence, that the river could be navigated for thirty miles above Jackson, but whether in small canoes only, or in larger craft, was not shewn.

On the part of the Defendants, depositions were read to impeach the general character of *Foster*, and others in reply to support him. The Defendants also proved that some coal and some slate had been found near Jackson, but the extent of the formation and its quality, did not appear. They also proved, that after the sale, the Plaintiff several times expressed his satisfaction at his purchase and his resolution to abide by it, and that after his first bond fell due, upon being applied to for payment, he asked for indulgence and gave an order for the payment of it.

This cause was elaborately argued by *Gaston* and *Badger*, for the Plaintiff, and by *Seawell* and *Hogg*, for the Defendants.

In the course of the argument, the whole doctrine of deceitful representations and of puffing at auction sales, as affording ground for relief at law and in equity, was very fully discussed, and the reported cases on the subject referred to and analyzed.

HALL, Judge.—When a few years ago the spirit of improving the internal navigation of the state was excited, various were the calculations that were made as to the consequences which would flow from it.

When the Legislature became actuated by the same spirit and passed many laws to facilitate its accomplishment, there were those who believed that the public agents or companies thereby established, with the means then in their power, could so far improve internal navigation, as to give an additional value to property, far beyond that at which it was then estimated, others were less sanguine.

A knowledge of engineering and the amount of funds necessary to success in such an important undertaking, was very limited. This state of things opened a grand door for speculation, and associations were formed for entering into them, and like the Defendants, purchased up favorite spots of ground for the erection of towns, and sold them out in lots, frequently for enormous prices, far beyond their value. And when the infautation and delusion under which they were purchased subsided, the law could afford no redress to the purchasers, because the speculation was a fair one, and this remark is applicable to the present Complainant, if there was no fraud used in the sale, at which he purchased sufficient in equity to set the sale aside. Whether there was or not, it is next necessary to ascertain.

It must be kept in view, that the great object to be accomplished, was the removal of obstructions in the River Roanoke, and making it navigable, it was that only which could give value to towns or lots—if it remained unnavigable, so as not to be the channel through which produce could be sent to market, the lands upon it whether laid off into towns or not, acquired no additional value—that was the grand pivot on which speculation turned ; whether success attended the enterprise or not, did not depend upon the proprietors of towns or the purchasers of lots. The means intended for that end, and the power of directing them were confided to the Roanoke Navigation Company ; if the undertaking terminated successfully, towns and lots would be valuable, if otherwise, they would only retain their original value ; in the latter case, the purchasers of lots would find themselves but illy compensated, by having bridges erected on the river, or in having coal mines or quarries of slate contiguous to it, or in having sites for manufactories upon it—no doubt if the river was navigable, these advantages would enhance the value of the lots, and taking it for granted that untrue representations were made of them at the sale, I cannot think that the contract for the purchase of the lots ought to be rescinded, because they would acquire their greatest value from the river being made navigable, and not from the coal mines and other advantages before noticed ; that the river is not navigable, is not the fault of the vendors.

If the case stopped here, I would say that the Complainant should be otherwise remedied, for the injury sustained by those misrepresentations, but that the sale on that account, ought not to be set aside.

There is another allegation in the bill of misrepresentation, that is that the town of Jackson was at the head of navigation. On this part of the case, the evidence is not satisfactory; it has been proved that the river above the town has been navigated a considerable distance, but whether in a light canoe or in what else, has not been stated. If it was sufficiently established, that the town was not at the head of navigation; and that the land on which it was laid off, was of little more, or no more value than other lands on the bank of the river in case the river was rendered navigable, I would say that the purchasers did not get that which they contracted for, and that for that reason, the sale ought to be set aside.

Again, although Jackson lay below the head of the navigation, yet if it possessed considerable commercial advantages, so that the lots bore some considerable proportion to the price given for them, the purchase, probably ought not to be set aside. When a case turns on considerations of this sort, all the circumstances attending it should be made out in evidence. It is useless to examine this part of the case any further, because there is another objection made to the sale of the lot, of more important concern to the vendors, which, I think, must decide the controversy, and that is, the employment of puffers to enhance the value of the lots at the sale. —This practice is forbidden by morality and fair dealing, and is condemned by the laws of the country, *Cowp.* 395, 6 *Term*, 642, and the apology cannot be alleged, that it was adopted as a defensive measure, (if such apology is admissible) to prevent the lots from selling for less than they were worth. (3 *Ves.* 628.) They had made no experiment in selling any of them, when they employed *Conner*, to bid for the first lot that might be offered, to $1000, well knowing, that the price for which that would sell, would have a great effect in fixing a higher value upon others, in the estimation of those who might bid for them. It matters not, that it has not been proved that any puffer bid for those the Complainant purchased. The lots were as articles of the same kind, or as Complainant's Counsel has better expressed it, they were as yards of cloth of the same web: other circumstances of puffing have been proved. I think, for this cause, the sale should be set aside.

Henderson, Judge:—I deem it unnecessary to examine the grounds of relief founded on the alleged fraudulent representation as to the peculiar advantages of the Eagle Falls, as the site for a town, for there are other grounds on which I am satisfied that this contract should be set aside. I mean the fraudulent employment of puffers at the sale. But I cannot forbear from observing, that the manner of making these represensations has very much the appearance of a fraudulent combination of individuals, to give to their statements a credit, beyond what they knew to be commonly allowed to those of ordinary vendors, and by them, intended to stifle fair and full examination; and, as it were, by bold assertion, coming from four or five influential individuals, and, from their situation, supposed to possess great knowledge of the navigation, to overcome the judgments of the less confident, and less intelligent. I say, I think it has much the appearance of such premeditated design, but I pass it over, and come to the puffing, as a very plain ground of relief. I shall not discuss the question, whether puffing is a fraud *per se*, for it is agreed by all, (even by *Ld. Roslyn*, who held some very strange opinions, to say the least of them, as to the inoffensiveness of puffing,) that it is allowable to prevent sacrifice, only, and not to procure an inflated price; and there is not the least pretence, that the object, in this case, was to prevent sacrifice; but the intent and effect was, to give this property a price far beyond its value, and this puffing was of the most fraudulent kind, for I consider not only the employment of *Conner* as puffing, but all that was said about his being employed to buy for some merchants in Lynchburg; the fraudulent offers made by some of the Company, of 1500 dollars for the lot; for asking him if he would take that sum, and saying that he had refused it, had the same effect, (and was so designed,) of severally offering it, to which may be adduced a species of puffing, calculated to produce the greatest effect; that *Galloway* had refused $75,000 for his land, on the opposite side of the river—nor can the Defendants protect themselves from the effects of their fraud, under the pretence, that at the time the lot in question was knocked off to the Complainants, that he was contending with real bidders; for the question was not as to the *relative* value of the lots, but the value of *a lot*, in the town; having fixed that, by their puffing, the cheated and deluded bidders might well be trusted to settle that matter, *the relative value*, among themselves, without the aid of bye-bidders. The rule laid down by the Complainant's Counsel, is certainly a wise one, that at the sale of a horse and an ox, puffing the sale of the horse, is not puffing the sale of the ox, because the bidding for the one, does not, in the estimation of the bidders, enhance the value of the other—but this is like the bidding for a yard of cloth—it enhances the price of each yard in the whole piece. The law makes no distinction without a difference. *Morehead*, therefore, stands in the same situation as if he had been contending with puffers, and the last bid but his own, had been made by one of them: for in reality the bidders all became puffers, mere machines in the hands of these men, who, after having set them going, might well retire from the work, and enjoy the spoils.

The contract must be set aside, and upon the Complainant reconveying, by a conveyance approved by the master, and deposited in this office, for the benefit of the Defendants, a perpetual injunction will issue. The defendants will pay all costs both at Law and in Equity.

TAYLOR, Chief-Justice, concurring,

DECREE ACCORDINGLY.

EQUITY CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF NORTH CAROLINA,

AT JUNE TERM, 1827.

Susannah Bryan by her next friend
v.
Henry Bryan & John Sellers, Adm'rs. of Josiah and Easter Blackman.
} From Johnston.

Where land was sold for partition under the act of 1812, and the share of a feme covert paid to her husband, a Court of Equity will decree her an indemnity against him.

Under such a sale, the share of a minor, not being vested according to the act, a Court of Equity will follow the property, and decree it to an heir against the administrator.

A feme covert being thus entitled, it was held that she could, by her next friend, maintain an adversary suit against the administrator and her husband, and that the fund was not liable for the debts of the latter, either to the administrator or to the intestate.

In this state, no settlement being made on the marriage, the wife has no equity against her husband, he being insolvent, for a provision out of her choses accruing during the coverture.

The allegations of the bill were, that the Plaintiff married the Defendant *Bryan*, in the year 1816; that she brought him a large property in slaves and money; that after the marriage, real property descended upon the Plaintiff as one of the heirs of her mother, which was sold under an order of the Court of Equity for the county of Johnston, for the purpose of partition; that the Plaintiff's share of the proceeds was received by the Defendant *Bryan*, her husband, who had appropriated it to his own use. That no settlement had ever been made upon the Plaintiff by her husband, who had become entirely insolvent. That *Josiah* and *Easter Blackman*, a brother and sister of the Plaintiff, had recently died intestate, and within age, leaving the Plaintiff and three others their next of kin, and heirs at law. That the property of *Josiah* and *Easter* consisted of their respective shares of the real estate, sold under the order above mentioned, and a balance of cash due by their guardian; and that administration upon the estates of *Josiah* and *Easter* had been committed to the Defendant *Sellers*, who had received their portion of the proceeds of the real estate, as if it was personalty.

The prayer of the bill was for general relief, and that the Defendant *Sellers* might be enjoined from paying over the surplus in his hands to the Defendant *Bryan*, and that it might be secured according to the settled course of the Court, for the sole and separate use of the Plaintiff.

The answer of *Sellers* distinctly admitted all the above facts; but averred first, that the Defendant *Bryan* was the guardian of his intestates, and owed their estates a large balance, for the recovery of which, he being insolvent, proceedings had been instituted against his sureties. Secondly, that *Bryan* owed him, *Sellers*, individually; and he contended that the residue in his hands, claimed by the Plaintiff, was subject to the satisfaction of one or both of these debts.

The answer of *Bryan* was not read at the hearing, and did not at all vary the case.

Devereux, for the Plaintiff.

1. The wife is clearly entitled to the proceeds of the real estate. By the express provisions of our law, this descends as realty: over this therefore, the husband has no control. (*Act of* 1812, *Rev. c.* 847.) Being thus entitled, and having no mode pointed out by law whereby she can avail herself of this right, this Court will aid her, and secure it to her separate use. (*Wynne & wife* v. *Tunstall*, *ante* 23.)

2. The wife has, in this Court, a well settled equity against her husband, for a separate maintenance out of her choses in action, particularly when the husband is insolvent. It is recognized as existing against the husband personally, and to deny her the privilege, by her next friend, of enforcing this equity, is to give her a right, and deprive her of a remedy.

3. The debt which the husband owes *to Sellers*, does not affect the equity of the wife; neither is it affected by the fact that he owes the estates of the deceased brother and sister. (*Elibank* v. *Montolieu*, 5 *Ves.* 737.—*Carr* v. *Taylor*, 10 *Ves.* 574.) This follows as a necessary consequence from the fact, that the equity of the wife cannot be affected by the assignment of the husband. The same authorities are full to the point, that the wife may, by her next friend, institute an adversary suit against her husband.

4. It appears from the pleadings, that the husband owes a legal debt to the wife—he having received and converted to his use her share of the proceeds arising from the sale of real estate descended from her mother. If all the other grounds upon which her case is founded fail, this must avail her. It is admitted as a general rule, that this Court will not entertain a bill seeking to subject the debts of another to the satisfaction of his creditors, until the claim has been established at law. But as the law gives the Plaintiff in the

present case, no means of establishing her demand, this rule must be dispensed with.

Badger, for the Defendant *Sellers*.—It is admitted, that in England, the claim of the Plaintiff would be irresistible, and that she might there assert it in the manner in which it is now sought to be enforced.

1. But this equity of the wife, is founded upon the very artificial state of society existing in England. There is nothing similar to it in our country. It is repugnant to the genius of our institutions, and to the manners and habits of our people. It tends to create a distinct interest between husband and wife, which is destructive of the end of the marriage state, as to property. This view of the case, is strengthened by the fact, that this is the first attempt to enforce this equity in our Courts, although they have now been established nearly a century, and it is a principle which is familiar to the whole profession.

2. This rule of the English Courts of Equity ought not to be adopted with us, because our statute of distributions gives the wife an indefeasible interest in the personal estate of the husband. It is, in England, founded upon the notion, that it is hard, unjust, and contrary to natural equity, to permit the property of the wife to swell a fund, from which the caprice of the husband may cut her off. With us, nothing but the insolvency of the husband can prevent his wife from receiving a share of his estate. The law makes her equally the partaker of his prosperity and of his adversity.

3. As to the claim of the Plaintiff as a creditor of her husband, so far as respects the receipt of her real assets; it can only be redressed by an application to the Court under whose order the land was sold, and by a motion in the cause where the sale was ordered, to secure to her, her share. It does not form a ground for a distinct suit in this Court.

Devereux, in reply.—The manners and customs of our country, as well as our laws, being derived from England, it is fair to presume, that those principles which have been sanctioned by the experience of ages there, will be found applicable to us; especially when we consider the great and increasing intercourse between the two countries, and that we are pursuing the same career in trade, and the acquisition of wealth. This principle of the English Court of Equity has been adopted in several of the States. *Howard* v *Moffat* (2 *John. Ch. R.* 206) *Glenn* v. *Fisher*, (6 *do.* 33) *Dumond* v. *M'Gee* (4 *do.* 318) *Kenny* v. *Udall* (5 *do.* 464) *Haviland* v. *Myers* (6 *do.* 225) *Haviland* v. *Bloom* (6 *do.* 25 & 178) *Ex parte Beresford* (1 *Dessaus. Ch. Rep.* 263.)

The fact, that by our law, the wife has a certain interest in the personal property of the husband, cannot affect her. Our statute is but little more than a copy of the customs of the city of London, and the province of York, yet in all the English books, no case can be found, exempting the husbands bound by those customs, from the rule contended for. Our act of 1784 (*Rev. c.* 204, *s.* 8) gives the wife dower only in the lands of which the husband *died seised*—whereas the common law gave her much more extensive rights. It may be doubted whether the wife is better provided for under our laws, than under those of England.

Taylor, Chief-Justice.—This is a bill filed by a married woman against her husband, and the administrator of her deceased brother and sister, seeking to enjoy the latter from paying over to her husband the Complainant's right to distributive shares which have been received by the administrator; and praying, in consideration of her having brought a considerable fortune to her husband, who is now insolvent, that the said shares may be settled to the separate use of herself and children, and secured from the claims of her husband and his creditors.

Part of the sum claimed by the Complainant, is derived from the sale of the real estate of her deceased brother and sister, who were minors at their respective deaths, which sale was made for the purpose of partition, but the Court of Equity directing the partition, omitted to settle the proceeds, so as to secure them to their real representatives. The residue of the sum claimed by the Complainant, is the produce of the peronal estate.

As the sum raised by the sale of the real estate is considered as land, and is payable to those who would have been entitled to the inheritance, I am of opinion that the wife has an equity for a separate settlement of that sum upon her; and although the act makes it the duty of the Court ordering the partition to secure it to the real representatives, yet the right of the wife cannot be prejudiced by the omission. If there was any doubt of the fact, the Court ought not to proceed without further enquiry, but it is distinctly admitted by the answer. This bill therefore, as to this part of it, may be considered as a bill to carry the former decree into execution; in which case, the Court will vary the decree where the mistake is evident, (*Mitford* 75) and will also correct it on motion. *Newhouse* v. *Mitford* (12 *Ves.* 456.)

With respect to the claim of the administrator to retain the sum due to him, out of the money thus accruing to the wife, I think it cannot be supported. The administrator is trustee for the next of kin, of whom the Complainant is one. As she has a clear equity against her husband, as to this money, that must operate to bar any right of retainer he can set up to the property of which he became administrator; and in *Carr* v. *Taylor* (10 *Ves.* 574) it was decided, that although the husband was indebted to the estate of the person under whom the wife claimed the property, yet the administratrix of such person could not set off the debt against the wife's title by survivorship to the fund; for the property being a share of a residue, the Court said it could not be sued for but in the joint names of husband and wife, and that if he had died without reducing it into possession, it would have survived to her, and consequently free from the husband's debts.

The Complainant's claim to the produce of the personal estate, cannot I think be supported. When a settlement has been made on the marriage, but an inadequate one, and property accrues to the wife afterwards, in the nature of an equitable right, the Court will sustain a similar claim in behalf of the wife against the husband, and in many instances against creditors. The equitable right which a married woman has, in a Court of Equity, to a provision out of her own fortune, before the husband reduces it into possession, stands upon the peculiar doctrine of the British Courts of Equity, is almost always connected with the enquiry as to settlement, and is the result of a state of society highly artificial.

But even there it is uniformly held, that where the husband can come at the estate of his wife without the aid of a Court of Equity, the Court cannot interfere. Our law has made an alteration in favor of the widow, with respect to personal property, so material as to render questionable that equity for a settlement as against her husband, which is so well settled in the British Courts. I will not deny, that there may be cases where an application of this kind may be proper here, as where the husband will not maintain his wife, and is likely to possess himself of a legacy or distributive share coming to her. But where they live together, and make a joint effort for the maintenance of the children, I should doubt the propriety of extending further the notion of separate interests. It may be a hardship for a married woman who brings a fortune to her husband, to find herself and her children reduced to poverty; but she knew when she married him, that the law gave him an absolute property in all her personal estate capable of immediate possession, and in all she should afterwards acquire, if reduced by him into possession during coverture. The hardship might have been guarded against by a settlement, and the not making one, is an evidence that she agreed to share his fortune, be it prosperous or adverse.

The wives and children of his creditors may come to poverty by not receiving their debts, contracted upon the faith of property apparently belonging to him.

I am unapprized of any decision in this State, extending the practice further than requiring the husband to make a reasonable provision for his wife, where the aid of this Court is necessary to enable him to take possession of her property; and exacting the same provision from his legal representatives or assignees, where they are obliged to come here to establish a claim which accrued to the husband in right of his wife.

Per Curiam.—Direct an account of the assets of *Josiah* and *Easter Blackman*, and direct the Clerk to distinguish the amount of real assets which have come to the hands of *Sellers*. Direct also an account of the proceeds of the real estate of the Plaintiff, which came to the hands of the Defendant *Bryan*, and retain the cause for further directions.

Ashmon T. Collier & Elizabeth his wife
v.
Hasten Poe.
From Chatham.

The statute of limitations does not apply as between bailor and bailee, and the latter cannot, by denying the bailment and claiming against the bailor, make his possession adverse.

Where a father upon his daughter's marriage, before 1806, sent home property with her, it was presumed to be a gift as between the parties, and should be taken as such in favor of creditors.

But a declaration to the daughter accompanying the delivery, that a loan and not a gift was intended, is sufficient to rebut the presumption, and convert the husband into the father's bailee, although such declaration was unknown to the husband.

The bill was filed in February, 1824, and set forth, that the defendant in 1804, intermarried with a daughter of one *James Paine*, who, within a week after the marriage, put into his possession several negro slaves, expressly declaring at the time in the presence of the Defendant and of his wife, that he did not intend the negroes as a gift, but merely lent them during his pleasure—that the wife of Defendant had issue the Plaintiff *Elizabeth*, and immediately after died,—that *Paine* died about the 4th of December, 1807, having first made his will, and bequeathed the negroes to the Defendant for eighteen years, and then directed them to be divided between the Plaintiff *Elizabeth* and the defendant—the moiety of the Defendant to be retained by him during his life, and after his death, to vest in her. The bill then set forth the marriage had between the Plaintiffs, and charged that the Defendant had denied their title, had sold some of the slaves, had threatened to sell others—that he was possessed of but little property, and the Plaintiffs believed would remove all the negroes beyond the state. The plaintiffs prayed a special writ directing the Sheriff to seize the negroes and retain them till surety should be given to prevent such removal, and to produce them when required by the Court, and for an account and general relief.

The answer denied the loan, and insisted upon the delivery of the negroes as an advancement to the Defendant's wife, and alleged that the Defendant had always held and claimed the negroes as his own property, that when some report was circulated of the claim now set up by the Plaintiffs, he had openly and publicly announced his title—had for more than three years before the death of *Paine* and ever since exclusive, continued and adverse possession of the slaves, and insisted on the statute of limitations.

By the proofs it appeared, that when the negroes were about being sent to the house of the Defendant by *Paine*, he did declare to his daughter, that they were lent during his pleasure, and were not designed as a gift, but it did not appear that the Defendant was present. And it was also in proof that the Defendant always claimed title to the negroes, that he made it known, and held them as his own, in opposition to the title now set up.

The cause was submitted without argument, by *Murphey & Nash*, for the Plaintiffs, and *Gaston*, for the Defendant.

HENDERSON, Judge.—It has long been settled by the decisions of our Courts, that if a parent puts property into possession of a child who has left, or is about to leave the parent, such property is presumed to be given, and not loaned to the child, and therefore purchasers and creditors have subjected it to their claims, whatever may have been the private understanding of the parties. *But this is a presumption of fact, and not of law.* Clearly, therefore, between the parties, and all others, who cannot impute either legal or actual fraud to the transaction, the true character of the act may be shewn. In this case, (the contest being between the parties) it appears very satisfactorily from the testimony, that the slaves were loaned, and not given, they therefore remained the property of the wife's father, and subject to his disposition.

The Defendant must therefore account for the hire and profits of the slaves, from the period his interest in them ceased, to wit: 18 years after the death of his wife's father, and as it also appears, from the Defendant's answer, that he has sold more than one-half of the slaves, those remaining in his possession must forthwith be delivered to the Complainants. As to the statute of limitations, relied on in the answer there is no preence for its *operation*, either ig law or equity The possession of the Defendant was that of a mere bailee ; notwithstanding his declarations that he claimed them as his own, he could not, by his own act throw off his character of bailee. In ascertaining the character in which he received and held the negroes, it is not material that he should have been informed that the slaves were loaned, and not given, for he came to the possession *as husband*, the loan being made to the wife, at least she was the meritorious cause of it, and she had full knowledge. The Defendant must also pay the costs ; for although the bill was filed before the expiration of the eighteen years, yet Complainants had just grounds to apprehend a further waste of property from the previous conduct of the Defendant, admitted by his answer.

Per Curiam.—Decree accordingly.

Nathan Ivy, and Polly his wife
v.
Aaron Rogers Adm'r. of Sarah Rogers, } From Wake.

Although lapse of time is no bar to an express trust, yet payment or other satisfaction, may be presumed from it.

Where an administrator, two years after his qualification, made a return to the County Court, admitting a balance against him, a Bill filed 20 years afterwards by the next of kin, for that balance, without accounting for the delay, is too late.

It seems that the return alters the relation between the administrator and the next of kin, and divests the former of his character of trustee.

This was a bill filed in the Court of Equity, on the 15th of September, 1823, for an account and distribution of the estate of the Defendant's intestate. The bill only set out the Plaintiffs title, which was not disputed, and concluded with the usual prayer.

The Defendant, in his answer, stated that his intestate died, and administration was committed to him in the year 1800, that two years thereafter, he had, pursuant to an order for that purpose, returned his account to the Court, which exhibited the sum of $28 45, due each of the next of kin—averred that he had paid the Plaintiff *Polly*, the amount due her before her intermarriage with the Plaintiff *Nathan*, and insisted upon the lapse of time as a protection.

There was some evidence taken and read at the hearing, but its recapitulation is not necessary to the elucidation of the case.

Devereux, for the Plaintiff, referred to *Falls* v. *Torrance* (2 *Hawks*, 490—4 *do*. 412.)

W. H. Haywood, contra.

Taylor, Chief Justice.—The equity of this case depends upon the question, whether satisfaction of the sum demanded in the bill ought to be presumed, on the ordinary principles on which this Court proceeds. In 1802, the Defendant settled his administration accounts, in which he charged himself with a balance due the distributees. This settlement was made under the authority of the County Court, in the customary mode; and if no higher effect can be ascribed to it, as an *ex parte* proceeding, it possessed, at least, this quality, of enabling all the parties concerned in interest, to ascertain the sum acknowledged to be respectively due them, to enforce the payment, if they were satisfied with the ocrrectness of the accounts, or to open them if they were dissatisfied.

In 1828, more than twenty years afterwards, this bill is filed, without showing any reasons for the delay, and containing only on that point, the general and formal allegation, that the Defendant had failed to account, after being requested to do so.

Now had a bond been executed to the Complainants for their individual share, and no interest paid within the time, the presumption of payment would have arisen at law, and been effectual to prevent a recovery, unless it could be repelled by some of those circumstances, which are usually relied upon for that purpose; such as insolvency or near relationship, or the absence of the party entitled to the money.

Though this case is purely of equitable jurisdiction, and not subject to any legal bar, by force of the statute of limitations, yet this Court has from an early period adopted rules as to barring an equity, drawn as nearly as possible from analogy to the rules of law. Thus a mortgagor coming to redeem after twenty years possession by the mortgage, without showing some act, in which it was treated as a mortgage within that period, is too late. The principles of all these decisions has been affirmed and sanctioned by an act of the last legislature, by which the presumption arises within ten years.—(*Acts of* 1826, *c.* 28.)

In a case marked with the circumstances presented here, the Court will presume satisfaction, and throw the *onus pro-*

bandi upon the distributee, who ought to satisfy the Court that the presumption cannot take place, otherwise the greatest mischief may be apprehended from parties being called on to account at a remote period, when according to the course of human affairs, their vouchers may be lost, or their witnessed may be dead.

The presumption of payment is materially strengthened, when a sum of money is acknowledged to be due to a particular person, the payment of which may be enforced at his will; for as a man must be supposed to be always ready to enjoy what is his own, proceedings would have been sooner instituted, had the money not been paid. Where the Defendant can discharge himself only by a payment of the money into Court, the presumption is impaired in its strength, *Hercy* v. *Dinwiddy* 2 *Ves. jr.* 90.)

The only demand of this money proved in this case, was made about the time of filing the bill; but I do not conceive it would have varied the principle of the decision, if an earlier demand had been shewn, for the mere demand of a debt without process, or any acknowledgment, is not sufficient to take a case out of the statute of limitations; nor, as I apprehend, would a demand without process, repel the presumption from the lapse of time. (*Oswald* v. *Legh*, 1 *Term Rep.* 272.)

With respect to the answer made to the loss of remedy from the lapse of time, that the Defendant is a trustee, and therefore cannot avail himself of this defence. I deem it unnecessary to examine the doctrine relative to express and implied trust, because the settlement of account by the administrator presents a clear ground of decision, whatever the Defendant's original character may have been. From that time the trust ceased to be open, and the Defendant stood in a new relation to the Complainant as his debtor. Could the Complainant have sued at law, his cause of action would there have accrued, and the statute would have begun to run from that time. Certainly then, the Defendant may rely upon the lapse of time in this Court.

This does not however, appear to be a case wherein the Defendant is entitled to costs, for though the bill should be dismissed upon the general presumption of payment, which is raised in these cases, where there are no means of creating beliefs or disbeliefs, yet the Defendant's allegation of the fact is vague and unsatisfactory. He only states that he has long since paid the Complainant, before her intermarriage. It is neither specific as to time, place, or attending circumstances, which would render it impossible to be met by counter evidence. The rest of the answer as to the fact of payment, is argumentative.

Per Curiam.—Bill dismissed without costs.

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Hill ar Hooks and Mary his wife,
v.
John Sellers and Wm. Ashford,
Adm'rs. of Josiah Blackman.
} From Wayne.

Exceptions to a report upon a reference to take an account, are unnecessary when the Master assigns unsatisfactory reasons for his conclusions.

It seems that a bill to correct errors in an account, is, in its nature, an exception, and to a report on such a bill stating a new account, none need be filed.

The bill which was filed in August, 1819, charged, that *Josiah Blackman* was the guardian of the Plaintiff *Mary*, and received of her property a large sum; that he died intestate, and that administration on his estate was committed to one *William Blackman*; that after the intermarriage of the Plaintiffs, to wit: on the 10th of June, 1816, the Plaintiff *Hillary*, and *William Blackman*, came to a settlement of the guardian accounts of the intestate, and that a balance was found to be due the Plaintiff; that in taking the account error was committed, in not charging the intestate with the hire of the negroes and the rent of the land belonging to the ward, for the years 1799, 1800 and 1801; that *William Blackman* died intestate, and that administration *de bonis non*, of *Josiah Blackman* had been committed to the Defendants. The prayer of the bill was for general relief, and that the Defendants might, by the decree, be compelled to pay the Plaintiffs the sum due them by reason of the errors.

The Defendants, in their answer, admitted all the facts charged in the bill, except the existence of the errors as specified, of which they put the Plaintiffs to strict proof.

Upon a reference to the Master, he reported that the errors charged in the bill did exist, and that the sum of $1274 53 was due the Plaintiffs, from the estate of the guardian. The only evidence reported by the Master was an account produced by the Plaintiff *Hillary*, and by him sworn to be the one used by *William Blackman*, on the settlement in June, 1816, from which the items of hire and rent for the years 1799, 1800 and 1801, after being inserted, were erased; a book proved to be in the handwriting of *Josiah Blackman*, with an entry on the first page, that it was "a book to keep the hire of negroes belonging to the orphans of *William Fellow*, deceased," (the father of the Plaintiff *Mary*) in which the hire and rent for the above mentioned three years was entered without remark, and every other entry in it, relating to the property of the Plaintiff, was incorporated into the account. Also the deposition of one *Elliot*, who swore that he had been called on as an arbitrator to settle between the Plaintiffs and *William Blackman*, as administrator of *Josiah*, that a former account was produced, in which the rent and hire for the above-mentioned three years was erased, and that the arbitrators seeing no reason why those erasures were made, had taken the several items into the account.

Upon the coming in of the report, his honor Judge Ruffin, pronounced a decree of confirmation, and awarded execution. The Defendant not having an opportunity of appealing, brought the cause to this Court by *Certiorari.*

Although the decree below recited that exceptions were filed, they probably were not reduced to writing; none appeared upon the transcript.

In this Court, *Badger* for the Plaintiffs, insisted that the report not being excepted to, must of course stand.

Gaston, contra, contended, that none were necessary, as the evidence reported plainly, did not justify the Master in his conclusion.

Henderson, Judge.—I can see no grounds upon which the report of the Master can be sustained. That no cause is assigned, why items originally inserted in an account, were obliterated, is certainly a very insufficient reason for reinstating them, in the absence of all evidence to prove the propriety, of originally inserting them.

As to the objection that the report was not excepted to in the Court below, we cannot shut our eyes to the unsatisfactory reasons assigned by the Master. In such a case exceptions are unnecessary; they would only point out that which is sufficiently obvious. Besides, this being a bill to surcharge and falsify, it is, in its very nature, an exception as to the items complained of, and in the laxity of practice, as yet allowed in this State, in a report like the present, we will look into it without formal exceptions. The decree must be revised, and the cause remanded.

Per Curiam.—Decree reversed, and the cause remanded.

Richard Kennon and wife and others, next of kin to Abraham Harper,
v.
Henry Branson and Tho's. Ragland, Adm'rs. of said Harper.*
From Chatham.

The jurisdiction of the County Courts as Courts of Equity, being confined to suits for distribution, they have no power to make any order in such suits, which is not necessary to a correct decision.

Therefore, in a petition for distribution, where the administrator and the intestate had been copartners, and upon a reference of the partnership and administration accounts, a balance was reported against the estate—it was held, that this only formed a *defence* against the suit—and that a decree against the next of kin for such balance, was erroneous.

Whether a Court of general Equity jurisdiction can decree the Plaintiff to pay a balance against him —*Quere?*

This was a petition in Equity filed in the County Court, at May term, 1816, in the common form, praying that the Defendants, administrators of *Abraham Harper*, might render an account of their administrationhsip, and make distribution. Owing to the destruction of the Clerk's office by fire, the transcript was very defective, and nothing appeared of the cause, except the original petition, the subpœna and the return thereon, until the Fall term of the Superior Court in 1824, when a report made before that time was set aside, and the cause referred to the Clerk "to take all the accounts of the Defendants, as administrators of *Abraham Harper*, and also of the said *Harper* with either of the Defendants," with leave to examine the parties upon interrogatories; accompanied by an order that all the books and papers relating to the accounts, should be filed with the Clerk. At Spring term, 1825, the Clerk made a report, wherein he stated, that under the order of reference, he had first proceeded to take the accounts of *A. Harper & Company*, which was composed of the intestate, the Defendant *Branson*, and one *Samuel Allen*. Secondly, the accounts of a copartnership composed of the intestate and the Defendant *Branson*. Thirdly, the private accounts between the intestate and *Branson ;* and fourthly, the administration account of the Defendants. The general result of all which was, a balance of $6235, 62, due the Defendant *Branson*.

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* The Reporters have entertained doubts whether suits of this kind, in their classification, belong most properly to the Law or Equity cases—the forum being strictly legal, but the subject matter and the form of proceeding purely equitable.

Many exceptions to this account were filed, which are not noticed, as the case was not decided upon them.—His honor, Judge NORWOOD, on his last circuit, decreed, " that the Defendant *Henry Branson* recover of the petitioners $6235, 62, of which sum it is adjudged and decreed, *&c.*," specifying the amount to be paid by each petitioner. From which decree, the latter appealed.

The *Attorney-General* and *Gaston* for the Appellants, were stopped by the Court, and upon an intimation from the Bench, of a decided opinion against the Defendants *Nash*, *Badger* and *W. H. Haywood*, for them, declined arguing the cause.

HENDERSON, Judge.—Had the Plaintiffs resorted to a Court of Equity to recover their distributive shares, I doubt very much whether a decree could be made against them, or even against the property of the intestate in their hands, for any balance which might be due to the Defendant, upon taking an account of transactions between him and the intestate, they having stood in a relation to each other which subjected them to an account. But be that as it may, I think that the Courts of Law, in cases of petitions for filial portions and distributive shares, being in this respect, Courts of limited jurisdiction, have no such power. It is true, that if an account between the parties is necessary to sustain either the charge, or the defence, *quoad hoc*, the Court has jurisdiction, but no further. In the present case, if an account of the different partnerships in which the intestate was concerned, was necessary, either to support the case of the petitioners, or the defence of the Defendant—so far the Court had jurisdiction to take it; as it would be absurd to confer on the Court the power of deciding, and yet withold from it the power of doing so correctly.

The account taken is therefore evidence, so far as it goes to discharge the Defendants, but for no other purpose; as to any other, it not being necessary to a correct decision of the suit, the Legislature has not conferred the power of taking it. The decree pronounced in favor of the defendants against the Complainants, must therefore be reversed, and the petition dismissed—the defendants paying the costs of this Court, and the Petitioners all other costs.

Per Curiam.—Decree reversed and the petition dismissed.

Newton Wood and Tabitha his wife, and Penelope E. Putney,
v.
Daniel L. Barringer, executor of Henry Moring.
From Wake.

A settlement made by an administrator, with commissioners appointed by an order of the County Court, is in no way binding upon the next of kin.

Where negroes were specifically bequeathed, and the share of one is set apart, and a profit is made by the administrator on another share belonging to an infant, this is no severance of the tenancy in common, and this profit may be recovered by the infant, in a joint bill for an account filed by all the legatees.

The bill which was filed in August, 1823, alleged that *Richard Putney* died in the year 1814, having made his will, whereby he devised his property equally, to his wife, the Plaintiff *Tabitha*, and his daughter, the Plaintiff *Penelope*. That upon the renunciation of the executors, administration with the will annexed, was committed to *Henry Moring*, who possessed himself of the personal property belonging to *Putney*, consisting of negroes and other chattels —all of which, except the slaves, he converted to his own use. That the negroes were hired out by the administrator for several years, "after which, he divided them according to the will." That the Defendant *Newton* and *Tabitha* had intermarried, and that the former had been appointed guardian to the Plaintiff *Penelope*, who was still an infant. That *Moring* was dead, having appointed the Defendant his executor, and prayed an account and payment of the legacies.

The Defendant by his answer, denied any appropriation of the estate by his testator, to his own use, and insisted that it had been properly administered. Further, that his testator in his lifetime, had made a settlement of his accounts as administrator, with three commissioners appointed by the County Court—that the Plaintiff *Wood*, was present when that settlement was made, and attended to it on his own account, and as guardian for the Plaintiff *Penelope*, and submitted whether the Plaintiffs were not barred in this suit, by that settlement.

On the coming in of the answer, it was referred to the Master to take an account, without prejudice, to the matter of defence insisted on in the answer.

The Master reported a larger balance due the Plaintiffs than that ascertained by the account taken before the commissioners. That the negroes belonging to the estate were divided in December, 1818—that the administrator had hired out those belonging to the Plaintiff *Penelope*, during the year 1819, and had never accounted for the hire. The Defendant excepted to the report, because the Master "charged the Defendant with the hire of the negroes belonging to the Plaintiff *Penelope*, for the year 1819, when he ought to have rejected all evidence thereof, as it was not claimed in the bill, or included within its allegations." By consent the cause was heard upon the defence set up in the answer, and also upon the exceptions.

Devereux, for the Defendant, contended,

1st. That the account taken under the order of the County Court was conclusive upon the Plaintiff, except in a bill pointing out errors in that account, and seeking to surcharge and falsify, (*Evertson* v. *Tappan*, 5 *Johns. Ch. Rep*. 511).

2d. That the hire of the negroes for the year 1819, appeared only in the proofs, and was not alleged in the pleadings. But on the contrary was against a strong implication resulting from the bill, which charged only for hire received before the division—and that the Plaintiffs could only recover upon the *allegata et probata*.

3d. That the division made in the year 1818, was a severance of the tenancy in common, and that the right to the hire for the year 1819, being a separate right in the daughter, could not be asserted in a joint suit with the other Plaintiffs; regularly this is a cause of demurrer; but as the fact only appeared on the proofs, the Defendant should have all advantage thereof at the hearing, (*Harrison* v. *Hogg*, 2 *Ves. jr.* 323—*Attorney-General* v. *The Corporation Carmarthen, Cooper's Eq. Rep.* 30.)

Badger and *W. H. Haywood*, for the Plaintiffs, as to the first point, was stopped by the Court—as to the second, they said the hire of 1819 was included in the bill, which was for an account, and this but one item thereof, and not a matter required to be specially stated.

They insisted that the division was not complete, until the Plaintiff *Penelope* came of full age, and sanctioned it, and therefore the hire of 1819, was a joint right in the Plaintiff.

HENDERSON, Judge.—Whatever may be the character of the statement which the Defendant calls a settled account, it certainly is not such a statement or settlement, as precludes a bill for an account, and drives the Plaintiffs to a bill to surcharge and falsify. It may, and possibly should have some weight in taking the account, particularly where the person who stated it, as in the present case, is dead. It is not a stated account, because the adverse parties had no compulsory process to compel the attendance of witnesses, or any right to controvert it. All that was conceded to them, wa a mere matter of courtesy, including notice, for it appears that they were present; but whether they had notice in time to prepare for an investigation does not appear. The principal objection however, is, that they were not parties, and therefore could not compel the attendance of witnesses. Nor does it appear that the account had been rendered to them beforehand, so as to enable them to inform themselves of its correctness.

It is next objected, that the hire of the negroes for the year 1819, ought not to be included; first, because it is not within the charges in the bill; and, secondly, if it is, it arose after the union of interests in the Plaintiffs had ceased

As to the first point, I think it is within the charges of the bill. The bill calls for an account, until the division and delivery over of the slaves—for I must so understand it. The allotment of the negroes between the mother and daughter, was made at the close of the year 1818, and the first part allotted to the mother, delivered to her; the Defendant retained the daughter's share a year longer, as I understand the bill, in connection with the proofs; for it is not stated when that was delivered. The bill, therefore, contains a charge for 1819. As to the second point, viz., that the bill is multifarious, asserting a separate interest in the daughter (after the division) in a joint suit with the mother. This, I think, is incorrect in point of fact. They had a common interest before the close of the year 1818, which continued until the division was ratified by the daughter.

Notwithstanding the delivery to the mother, the mother and the daughter both retained their rights in the whole, until the daughter ratified the division; for the consideration that the mother surrendered her claim to those allotted to the daughter, was the ratification of the allotment made to the mother. So that in strictness, the property remained in common until the division became binding on both, as it could not bind one, unless it bound both.

The Defendant is liable to pay full hire for the year 1819, for his intestate, when rendering his account, failed to include it — and even under these circumstances, I think the hire very high. Yet, as it is according to the evidence filed, and we have no data by which to correct it, and to reduce it, we must refer the matter again to the Master, who with the same evidence would make the same report, it must be submitted to with reluctance. We would correct it; but the remedy might be worse than the disease.

Per Curiam.—Let the exceptions be overruled and decree for the Plaintiffs.

Francis Taylor
v.
William Dickins and others, } From Orange.

Upon opening the papers in this cause, his honor Judge Hall observed, that it did not appear from them, that publication had been made, as to some of the persons named in the bill as Defendants, although it had been frequently ordered; that replications had been filed to the answers of *Dickins* and *Langston*, but there was no order setting the cause down for hearing, without which it was premature, under the act of 1818, (*Revisal* c. 962, *s.* 5.) to transfer it to this Court.

Per Curiam.—Let the cause be remanded to the Court below, and let the party removing pay the costs of this Court.

Elijah Kimborough
v.
John Davis and Susan his wife, } From Wake.

An executory contract made in consideration of an intended marriage, whereby the parties covenant to make a provision for an illegitimate child of the wife, will, under the act of 1799, be protected in a Court of Equity—and its specific execution enforced, in favor of such child against the husband.

The original bill charged, that the Defendant *Susan* was the mother of the Plaintiff, and that upon an agreement of marriage between her and the Defendant *John*, the Plaintiff, being then an infant, it was agreed that a negro girl, and some other property, should be conveyed to the Plaintiff, on his arrival at full age—with an ulterior limitation, in case he should die without issue, to the children of the Defendants. That this agreement was made in consideration of the intended marriage, and that accordingly an executory contract was drawn up by the Defendant *John*, and signed by him and the Defendant *Susan;* whereupon the marriage took place. The bill then averred, that the Plaintiff had arrived at full age, and prayed a specific execution of the contract.—Under an order obtained on the filing of the bill, the Defendants answered separately. From both answers it appeared, that the Plaintiff was the illegitimate child of the Defendant *Susan*, who, in her answer admitted the agreement, and its consideration as charged in the bill. The Defendant *John*, in his answer, denied that the agreement was made in consideration of an intended marriage, and insisted that the writing referred to in the bill, was made to please the Defendant *Susan*, who lived and cohabited with him before the marriage, and by whom he had several children, at a time when she was sick; and relied upon the fact, that the agreement was voluntary on his part, as a defence against the specific execution thereof.

Proofs were taken and read at the hearing; from which the Court inferred, that the agreement between the Defendants, was made in consideration of an intended marriage.

W. H. Haywood, for the Plaintiff.—This Court will execute the agreement, for the *meritorious* consideration of providing for a child, otherwise left destitute. The English authorities are clear on this point, *if the child be legitimate.* And does that make any difference in North-Carolina? It is contended that it does not—for by our act of 1799, (*Revisal p.* 983) *natural* children are under certain circumstances, made capable of deriving and transmitting an inheritance. A bastard is no longer reputed to be *filius nullius*, for he is directly made otherwise, so far as respects his *mother*. A provision that is bottomed on the clearest principles of equity, and would doubtless have been extended further, but for the well-grounded apprehension of introducing uncertainty into descents and distributions; for while it is easy to ascertain the mother, it is difficult, and in many cases impossible, to pronounce who is the father of a child. Let it be borne in mind, that this is an agreement to convey a part of the mother's estate to her son, and no part of the Defendant *Davis's* property, is sought to be taken from him.

Seawell, who appeared for the Defendants, was absent at the hearing of the cause, upon official duty, and therefore it was not argued for them.

Taylor, Chief-Justice.—The case is, that the Complainant is an illegitimate child of the Defendant's wife, and he alleges, that immediately before the intermarriage of the Defendant with his mother, it was agreed upon between them and in consideration of the marriage, that a slave and some chattel property belonging to his mother, should be settled upon him and given to him when he arrived at the age of twenty-one years, subject to certain limitations.

To promise to give the negro, is admitted by the Defendant *Davis* and wife, and that they executed a writing to that effect. The consideration of the promise is denied by *Davis*, and admitted by his wife; and the whole circumstances of the case render it probable that her agreement to marry him, was the motive that induced his compliance with her request, for though she had lived with him several years before, and had children by him, yet without a marriage, he had not a complete control over her property; and immediately after the writing was executed, the marriage took effect. The Defendant *Susan* had children by her former husband, all of whom were provided for, and the Defendant *Davis*, was in circumstances fully sufficient to provide for the issue he had by her. The Complainant was the only one of her children not provided for, and it was perfectly just and natural, that she should stipulate for some provision for him, before she finally surrendered her property to another husband.

If the paper signed had been executed with the formalities of a deed, and actually transferred the property, it would have been competent for this Court to give effect to it as between the parties, although it were voluntary, according to the distinction stated in *Ellison* v. *Ellison*, (6 *Vesey* 662), if you want the assistance of chancery to raise an interest by way of trust, on a covenant or executory agreement, you must have a valuable or meritorious consideration; for the Court will not constitute you *cestui que trust*, when you are a mere volunteer, and the claim rests in covenant, as to transfer stock. But if the actual transfer be made, the equitable interest will be enforced; for the transfer constitutes the relation between trustee and *cestui que trust*, though voluntary and without consideration. There are cases too where a voluntary bond has been supported by a decree, (1 *Vernon* 427—3 *P. Wms.* 222). If the Complainant is considered as a volunteer, it may be doubted whether he can come into this Court, to raise a trust for his benefit; and although I believe there are no cases to be found extending the marriage consideration to illegitimate children, yet under the circumstances of this case, as influenced by the diversity of the law in this State from that of England, I think the Complainant ought to have relief.

The natural obligation of a parent to maintain his illegitimate offspring, cannot be doubted, (*Puffend.* 6, 4, *c.* 11, *sec.* 6,) and the Defendant *Davis*, in this case, succeeded to the duties and obligations of his wife, by virtue of the agreement made before the marriage, and in consideration of his acquiring a right to her property. Bastards may take a gift from their parents, where they are sufficiently described, they may take by devise, if they have acquired a name by reputation. They are not considered as children for whom the consideration of blood would raise an use; yet on an estate otherwise, effectually passed, an use may as well be declared to a bastard being *in esse*, and sufficiently described, as to any other person. In those cases in which the conveyance being taken in the name of the child, is held an advancement for, and not a trust in the child, the principle is, that the parent was bound to provide for the child, and having directed the conveyance to be in his name, is presumed to have intended to discharge such moral duty. If such be the principle, it will follow, that wherever such obligation exists in the parent, the beneficial interest shall enure to the child. "The obligation does extend to an illegitimate child, and consequently I should conceive him to be within the principle, and entitled to the benefit," (2 *Fonb.* 129). "Past seduction (says Chancellor *Kent*) has been held a valid consideration to support a covenant for pecuniary reparation; and the innocent offspring of criminal indulgence, has a claim to protection and support, which Courts of Equity cannot and do not disregard."

According to the law of England, bastards are incapable of being heirs. They are considered as the sons or children of nobody, and no inheritable blood flows in their veins, and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord. They can have no other heirs than the issue of their own bodies; for as they are considered the children of nobody, there can be no ancestors by whom a kindred or relation can be made The reason of excluding them from the right of inheritance, is on account of the uncertainty of their ancestors. But our Legislature, wisely considering that this rule ought not to extend to cases where there is no uncertainty, as the mother of a bastard, has made them inheritable to their mothers, and to each other. (2 *Revisal, c.* 522.)

The law establishing the succession to intestates estates, founded on the presumed will of the deceased, that if he had made a provision in his lifetime, it would be such as the law prescribes—that he would have done that which is equally prompted by natural inclination and duty; and it is one of the first of duties, that we take due care for the maintenance of those whom nature teaches us to cherish with peculiar affection.

The law having thus rendered illegitimate children capable of inheriting to their mother, would be untrue to itself, were it to refuse an enforcement of the expressed will of the mother in her lifetime, in a case where the Complainant is the only one of her children unprovided for. I conclude, therefore, that hereis a meritorious consideration, founded on the recognized relation, in which the Complainant stands to his mother and her husband, and that there ought to be a decree for him.

Per Curiam.—Decree according to the prayer of the bill, and give the Plaintiff his costs.

Henry Branson
v.
Elizabeth Yancy,
Mark Cooke and
Henry Cooke,
From Wake.

A widow, who after the death of her husband occupies his residence, his children, some of them of age, living with her, is under no obligation to pay the taxes accruing thereon, between his death and the assignment of her dower.

Therefore, a purchase by her of the premises, for such taxes, made after the assignment of dower, without actual fraud, will not be set aside in favor of her husband's creditors.

THE ORIGINAL BILL, which was filed on the 3d of September, 1817, stated, that *Sterling Yancy* died intestate in January, 1815, seised of two lots in the city of Raleigh, on which he resided at the time of his death, leaving children his heirs of law, some of whom were of full age, and others infants, and the Defendant *Elizabeth*, his widow—that dower in the said lots was assigned to her, under which she entered, and became seised thereof as tenant in dower. That a judgment was obtained against the heirs of *Yancy* on a *scire facias* in a suit against his administrator, wherein the plea of *plene administravit* was found for the Defendant—that an execution on that judgment had been levied on the lots in question, and that the Plaintiff had purchased of the Sheriff, under that execution. That about the time of the Plaintiff's purchase, the taxes assessed by the Commissioners of the city of Raleigh, upon said lots, became due, and were suffered, by the Defendant *Elizabeth*, to remain unpaid. That the Defendant *Elizabeth* continued to occupy the lots after the death of *Sterling Yancy*, as well before, as after the assignment of dower. That by a private act of the General Assembly, passed in the year 1803, for the government of the city of Raleigh, it was enacted, "that every tenant, occupying a house, &c. within the said city, shall be liable to pay the tax herein laid upon such house, &c. and on failure of the proprietor of any lot to pay the annual tax thereon, by himself, tenant or agent, on or before the first of August in each and every year, the Commissioners of the said city are hereby authorised to sell the same at public vendue." That by a subsequent act, passed in the year 1806, it was enacted "that in all cases where the owner of any lot, &c. in the said city, or the occupants thereof, shall fail to pay the taxes, &c., the Commissioners of said city shall cause to be sold so much of said lot, as shall be sufficient to pay the taxes due thereon, and no more." The Plaintiff insisted that the Defendant *Elizabeth*, being an *occupant* of the said lots, was bound to pay the taxes thereof; but that instead of doing so, she had combined with the other Defendants to defraud the creditors of *Yancy*, and the Plaintiff in particular—and had not only neglected to pay the taxes, but had fraudulently procured the whole of the lots to be sold for the taxes due for the year 1815, and to be bought in by the Defendant *Henry Cooke*, who had conveyed them to her.

The bill prayed a discovery, and that the Defendants *Elizabeth* and *Henry* might be declared to be trustees for the Plaintiff, and that all deeds executed in furtherance of the fraudulent combination, might be delivered up to be cancelled.

The bill was taken *pro confesso*, as to *Henry H. Cooke*, who was examined as a witness, under an order to that effect.

The Defendant *Mark Cooke*, against whom no decree was prayed, in his answer, denied all knowledge of the matters set forth in the bill.

The Defendant *Elizabeth Yancy*, in her answer, denied the Plaintiff's title to be valid, but alleged that it was defective and void—a judgment against the heirs having been taken by default, some of whom were infants. She admitted the death of her husband, as charged—and stated that her dower was assigned on the 23d of October, 1815, and that the sale for taxes took place on the 8th of November following; and insisted that the several acts of Assembly recited in the Bill, imposed upon her no obligation to pay the taxes charged upon the lots. She denied all fraud or combination, for the purpose of procuring a sale of the lots for the taxes, and averred, that she knew nothing of the sale, or of the purchase by *Henry Cooke*, until after it was over, but admitted that *Henry Cooke* had received from her the amount he gave for the lots, and had assigned to her, and that she had obtained a deed from the commissioners, of which the Plaintiff had notice before his purchase, and she claimed to hold discharged of any trust for the Plaintiff, or any one else.

This answer was fully supported by the testimony of *Henry H. Cooke*, and the other proofs taken in the cause, by which it appeared that the widow and children of *Yancy*, lived on the lots after his death and until the execution sale.

The private acts of the General Assembly for the government of the city of Raleigh, and the by-laws of that corporation, were filed as exhibits. By them it was proved, that the city taxes attached upon all the property within its limits, on the 1st of April in every year.

W. H. Haywood, for the Plaintiff, contended,

1st. That it was fraudulent for the Defendant *Mrs. Yancy*, to take an absolute deed for the two lots, when she was bound by law, as occupant, to pay the taxes. And that being thus bound, her agreement with *Cooke* amounted on his part, to a surrender of his right, for the benefit of the proprietor.

2d. That if the acts of 1803 and 1806, did not impose upon her the burthen of paying the taxes as an occupant, still as tenant for life of one third she ought to have paid that portion of the taxes, upon the same principle that compels the tenant for life to keep down the interest of an incumbrance. (*Lord Penrhyn* v. *Hughes*, 5 *Ves.* 99.)

3d. That the Plaintiff being a reversioner as to part, could not sue at law, and therefore was entitled to ask for a discovery and the relief prayed. For when his title at law accrues, his witnesses may be dead, and then he cannot have a discovery from the Defendant *Mrs. Yancy*, as his right to possession can only fall in after her death. (1 *Maddox* 185 2—*Haywood's Rep.* 226—1 *John. Ch. Rep.* 517—17 *Ves.* 112—1 *Ves. & Bea.* 244.)

Gaston & Badger, for the Defendants.

1st. The legal title was clearly divested by the sale to *Cooke*, and his purchase is not affected with fraud. The Defendant's title is therefore good, for the reason that a sale by a purchaser without notice, to one having notice is so, the second purchaser being protected by the equity of his vendor.

2d. The Defendant was liable only for the taxes which accrued after the death of her husband, and then only for the part which was due in respect to her dower, and the whole might have been sold for the taxes due upon the remaining two-thirds.

3d. The judgment on which the execution issued, was not merely irregular and erroneous, but void. This position is fully supported by the case of *Bryan* v. *Brown*, decided in this Court, (2 *Murph.* 343). But if the judgment is void, nothing passed to the Plaintiff by the Sheriff's deed, and he has no interest in the subject matter of the suit.

Hall, Judge.—It is stated that *Sterling Yancy*, the owner of the lots in question, died about January, 1815, leaving his widow and children in possession thereof;

that judgment was obtained against his administrator, from which process issued against the lots in the hands of the heirs, and that the Complainant became the purchaser. That the lots were sold for taxes about the 8th of November, in the year 1815—that the deed for them was made by consent of the purchaser to the Defendant *Elizabeth*, and that the widow's dower was laid off between the Courts which sat in August and November.

It must be admitted that all the right the heirs at law of *Sterling Yancy* had in the lots in dispute, was acquired by the Plaintiff when he became the purchaser of them; it is therefore necessary to ascertain what that right was. Upon the death of *Sterling Yancy*, the title to the lots descended to his heirs at law, who, together with the widow, were in possession of them; they descended, however, to the heirs at law, subject to the widow's right of dower; but until dower was allotted to her, the title to them was in the heirs. By the act of 1803, made for the government of the city of Raleigh, it was required that all taxable property should be given in on or before the first of April. By the same act, it is declared, " that every tenant occupying a house or houses, lot or lots, shall be liable to pay the tax laid upon such house, &c., and on failure of the proprietor of any lot to pay the annual tax thereon, &c., on or before the 1st of August in every year, the commissioners of the city are authorised to sell the same, &c." The act of 1806, also made for the government of the city of Raleigh, declares " that in all cases, where the owner of any lot, or the occupants thereof, shall fail to pay the taxes, so much of such lot as shall be sufficient to pay the taxes, shall be sold."

I think but little doubt can be entertained, that the heirs at law of *Sterling Yancy*, were the tenants and proprietors of the lots, within the words and meaning of both these acts. It was their duty, then, to give in their lots as taxable property, on the first of April, and to pay the taxes before the 1st of August in the same year. This, however, was not done, and the lots were afterwards sold, before the purchase made by the Complainant. At the time of his purchase, the heirs at law had no right to the property; it had been lost by the sale for the taxes. We are next to ascertain what remedy the Complainant has against the widow.

At common law, the widow was entitled to her quarantine, and in the meantime to be supported by the heir, and before the expiration of her quarantine it was the duty of the heir to put her in possession of her dower. Our law makes provision for the widow's support for one year, and points out the mode by which she shall be put in possession of her dower. By these laws, the right of the heirs and the widow are not altered; perhaps the time of her quarantine is thereby enlarged. Before the widow has her dower allotted to her she is a mere occupant, she has no right or title to the land, or to one part of it in preference to another;—she has a right to dower in one-third part of it, but what third part that may be, depends upon the allotment of it, and when that is made, she claims, and is in under her husband. In the present case, the widow was not bound to give in the land for taxes, nor was she bound to give in one-third of it. It is true, she was an occupant, but the heirs at law were occupants also, and the legal title was in them. When the land was sold for taxes, that sale divested the right of the heirs, and her claim to dower was swept off with it. The purchaser for the taxes had a preferable right to either of them, and for this the widow was not blameable; because if she was not bound either to enter the land for taxes, or to pay them, of course for not paying them she was in no fault—if she was in no fault, it is difficult to see how she committed one in taking a deed from the officer who sold them for the taxes, by the consent of *Cooke*, who bid them off. It is then upon that right she stands, and her dower right forms no part of it. It is not material when the Complainant purchased, whether he had notice of the sale to *Cooke* or not; he does not deny it, and she states in her answer, that he had notice.—The bill prays that she may be held as a trustee for the Complainant, and compelled to convey her title to him, because she fraudulently acquired that title. This, I think, is not established either by the law or the fact of the case. It will be understood that no opinion is given on the validity of her title; whatever it is, I am of opinion she should not be deprived of it by the decree of this Court. Neither is it intended to give any opinion on the Plaintiff's title at law, in case that of the Defendant was removed out of his way.

I am of opinion the bill should be dismissed.

TAYLOR, Chief-Justice, concurred in opinion with Judge HALL.

HENDERSON, Judge, *dissentiente*—*Mrs. Yancy* continued to occupy the house and lot on which her husband lived at the time of his death, which happened in January, together with her children, the heirs at law of her husband, some of whom were of full age, and some were infants. Her dower in one-third of the lot, was, on her petition to Wake County Court, assigned to her between the Courts in August and November. The city laws attached on the property (or occupiers) on the first day of April, and the tax became payable some time in the summer. The whole lot was sold in November for the taxes of that year, which were then unpaid, without her privity, or knowledge or contrivance, and *Cooke* became the purchaser for the amount of them, and communicated to *Mrs. Yancy* the benefit of his purchase, directing the City Commissioners to convey to her, which has been done. There has been no fraud, (as far as it appears, in any one.

No communication took place between *Cooke* and *Mrs. Yancy*, either directly or indirectly. The purchase was made by him to save the property, and from motives of kindness to *Mrs. Yancy*. The only fault was in the omission to pay the taxes. *Branson*, who claims to be a purchaser at an execution sale against the heirs of *Yancy*, prays that this title thus derived from the sale for taxes, may not be set up against him. There is an objection to the validity of his purchase, the judgment against the heirs being taken at the first term, by default, some of them being infants.

I am inclined to believe that the prayer of the Plaintiff is reasonable. It was the duty of the occupant to keep down the incumbrance and any acquisition of title, made by her, growing out of her omission, is for the benefit of all concerned. In the adjustment of accounts, for instance, in this case, between *Mrs. Yancy* and the heirs, as to the rents and profits, from her husband's death to the assignment of dower, she could not set up any claim against them for more than two-thirds of the taxes paid by her, leaving one-third to fall on her dower right. If she has no such claim against the heirs, she has none against *Branson*, if he is substituted to them; which depends on the validity of his purchase. I think *Mrs. Yancy* continued the occupation until the assignment of dower, in consequence of her dower right. Had she occupied the lot through the mere courtesy of the heirs, together with them, or was she only exercising her quarantine right as a courtesy and a bounty of the law, the heirs could not have imposed the payment of the taxes on her as a duty ; the gratuity must be made complete. The quarantine is allowed for a short time (forty days in England) that she may not be destitute of a home, before dower is assigned. I do not think that *Mrs. Yancy's* occupation on th first of April was o that character—it was in consequence of her right to dower.

Nor do I belive that it is competent for her to object to the supposed defect in *Branson's* title. She purchased for the benefit of all concerned—thereby professing that her omission, however innocent, should injure no one. *Branson* is not a mere officious intermeddler; he has at least an apparent title, and asks only a fair opportunity of asserting it in a Court of Law. As to two-thirds of the lots, that is, that part which was not, and could not be assigned as dower, I think that neither *Branson*, nor the heirs have any cause of complaint; for as to that, she did not, and could not occupy it in consequence of her right of dower, or expectation of its assignment to her. I for a moment thought that the heirs should have been made parties—but no decree is prayed against them, nor can I see how their rights are affected. It is with much deference to my brothers, that I express this opinion; but entertaining it, it is my duty to avow it.

Per Curiam.—Let the bill be dismissed without costs.

* * *

IN THE SUPREME COURT.

JUNE TERM, A. D. 1827.

Regulæ Generales.

It is ordered, that hereafter the Causes on the Equity side of the Court shall, before the Causes on the Law side are taken up, be heard and disposed of: and that the Clerk keep separate Dockets of the Equity and Law Cases pending in this Court.

A true copy from the minutes,

Teste, WM. ROBARDS, Clerk.

EQUITY CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

NORTH CAROLINA,

DECEMBER TERM, 1827.

David J. White, and
Ann J. Colvin,
v.
William H. Beattie,
Ex'r. of Ann J. White, } From New Hanover.

A bequest of a negro of a particular description, with a direction to the executor to purchase one, rather than divide families, is a pecuniary legacy.

Although specific legacies do not abate in favor of those which are pecuniary, yet where the testatrix bequeathed *all* her property specifically—and directed two negroes to be purchased for A and B, it was held, upon a deficiency of assets, that all the legacies must abate rateably.

The Plaintiffs in their bill set forth the will of the Defendant's testatrix, of which the following is a copy:

" When I am dead, I wish my brother W. H. B. to have my man *Will*, to do as he pleases with him, during his natural life. After that I wish him to go to my brother H. G. W., to do as he pleases with forever. To the children of W. H. B., I leave little *Flora*, and her children, to be equally divided among them. To H. W. B., *Grace* and her child, to do as he pleases with. To A. I. W., daughter of H. G. W., big *Flora* and her whole family that I own, I leave to her. To J., and J. P., one hundred dollars to each. To *David J. White*, a likely negro boy, between eight and ten years old. To *Ann J. Colvin*, a likely negro girl, between four and five years old. The graveyard walled in, a tombstone put over my mother and self, &c. &c. To R. W., my clothes. To A. J. W., my books. To M. A. B., the furniture of my room, say bed, drawers, &c. Pay all my just debts. I would rather you would buy negroes for *David J. White* and *Ann J. Colvin*, than to separate families. I wish all this done at once, so as to save their being scattered."

The Plaintiff insisted that the legacies left them were specific, and in case of a deficiency of assets, ought not to abate in proportion to the others. And that if they were not specific, that there were assets sufficient to satisfy them. The prayer of the bill was for an account, and payment of the legacies.

The Defendant insisted, that the legacies to the Plaintiffs were general; that all the property of his testatrix was specifically bequeathed, and that there were no slaves of the kind bequeathed to the Plaintiffs. Denied assets, and rendered an account, from which, after exhausting the assets, not specifically bequeathed, a balance appeared due the estate.

The cause was heard upon bill and answer. No Counsel appeared for either party in this Court.

TAYLOR, Chief Justice.—The two questions presented for decision by this record, are not of very easy solution, and the labour and difficulty have been increased, by the want of Counsel to argue them, and the absence of all reference to authorities.

The first question is, whether the bequest to *D. J. White*, of a likely negro boy, between eight and ten years old; and the bequest to *A. J. Colvin*, of a likely girl between four and five years, be specific or general legacies; for it is too clear to require a moment's examination, that the legacies of slaves to the other legatees are all specific.

The other question is, whether, if they should prove to be general legacies, the specific legatees are liable to abate *pro rata*, for the purpose of making them good, in the case which has occurred of a deficiency of assets to purchase them.

On the first question, the familiar definition of a specific legacy, in which all the writers concur, is, that it is the bequest of a particular thing, distinguished from all other things of the same kind—as of any chattel that would vest immediately upon the assent of the executor. Hence, money may be a specific legacy, if properly described, as a sum of money deposited in a chest or bag, or in the hands of a particular person. But if a sum of money is bequeathed, to be laid out in the purchase of lands, or to be vested in particular securities, it is a mere pecuniary legacy; for the legatee cannot, in that case, sever that from the general fund, so as to establish a right to the identical sum in specie. And this he must be able to do, in order to make his legacy specific. Thus, in a bequest of stock, if the testator owned it at the time, it is specific; more especially, if it can be collected from the will, that the testator intended to confine the bequest to the stock he had on hand at the time of his death. As if the legacy be of *my* stock, or part of *my* stock, or in *my* stock. (*Ashburner* v. *McGuire*, 2 *Brown's C. C.* 112.) But if a testator did not *own* the stock when he made his will, or died, but directed it to be purchased out of his personal estate for particular persons; on the question whether these legacies were specific or pecuniary, it was held by the Court that they were pecuniary. (*Gibbons* v. *Hall*—1 *Dicken's Rep.* 324.) If, in the case before us, there had been negroes belonging to the estate, of the ages described in the will beyond those allotted to the specific legatees, which the executor might have delivered over to the Plaintiffs, without separating families, they would have been, without doubt, specific, although not particular chattels, specifically described and distinguished from all other things of the same kind; but comprehended within the second class of specific legacies, described by *Lord Hardwicke*, as something of a particular species, which the executor may satisfy, by delivering something of the same kind, as a horse, a ring, &c. (*Purse* v. *Snaplin*—1 *Atk.* 415.

These authorities, and the reasoning extracted from them, lead me to the conclusion, that the legacies to the Plaintiffs, are general and pecuniary; and here begins the real difficulty of this case, for it is a claim on the part of pecuniary legatees, to make specific legatees abate, upon a deficiency to pay the first mentioned legacies; whereas the commonly received opinion is, that the advantage specific legatees have over pecuniary ones, is that they are not compellable to abaet, upon a deficiency of assets to pay general legacies. This is the general rule (2 *Vesey* 56.) And upon first reading the case, it appeared to me that the law was decidedly against the Plaintiffs. But upon a more attentive consideration of the will, and the situation of the estate, and upon an anxious search of the authorities, I think the Plaintiffs are entitled to what they ask.

It was the manifest intention of the testatrix, that all the legatees should have their legacies, if the estate was sufficient—they were all equally objects of her bounty; and if the specified legatees receive their respective shares in full, that intent, and that bounty, will be frustrated. And what seems a conclusive proof of this, is, that she had bequeathed all her negroes to the specific legatees, so that from what she had then bequeathed, the two slaves intended for the petitioners, must have been deducted, if it could have been done without separating families; for so I understand the direction to her executors. Circumstances might be such at her death that two negroes of the description bequeathed to the petitioners, might be unconnected with family ties, by the death of their parents or others; and in the occurrence of that state of things, they were to be allotted to the petitioners, from the negroes bequeathed. But if that should not happen. they were to be purchased from the residuum of her estate.

It does not appear, that the testatrix owned any thing but what she disposed of by her will. There is no proof that she was entitled to any real estate, nor that she had any reason to believe, that there would be a residuum of the personal estate, after the payment of debts and legacies. On the contrary, the accounts exhibited by the executor shew, that he was, until a very late period, and even after the account was stated, in advance to the estate, to the amount of several hundred dollars. Unexpected circumstances have replaced his advances, except to an inconsiderable amount; but he is still a creditor.

These views of the subject impress it forcibly on my mind, that it is essentially just and equitable, and in furtherance of the undoubted intention of the testatrix, that the petitioners should receive their legacies, or at least a rateable proportion of them, with the other legatees. But this belief would not, for a moment, incline me to violate or disregard any rule of law, to effect objects, however desirable. It could not be expected that much authority could be brought to bear on a case marked with such special circumstances; but I have found one which appears to be entirely and fully applicable to this case, the correctness of which has since been frequently recognized by writers of established reputation; and the illustration it affords, adopted and applied to the establishment of that exception to the general rule, by which alone these petitioners could have relief. "But if a man devises specific and pecuniary legacies, and afterwards says, that such pecuniary legacies shall come out of all his personal estate, or words tantamount; *or, if there is no other personal estate than the specific legacies,* they must be intended to be subject to the pecuniary legacies, otherwise he must mock the legatees." (*Sayer* v. *Sayer—Prec. Chan.* 393).

A very accurate writer on the law of legacies, cites the case thus: "A case may happen, in which specific legatees "will be obliged to share, in favor of pecuniary legatees. "Suppose then, a person possessing a personal estate at B "and C only, bequeath it specifically to D and E, and then "gives a legacy to F, generally; the personal estate at B "and C, will be liable to the payment of this legacy, as there "never was any other fund, out of which F's legacy could "have been satisfied." (1 *Roper on Legacies*, 418). The same case is cited by *Ballow*, in his Treatise on Equity, edited by *Fonblanque*, 2 *vol.* 377, and by *Toller on Executors*, 266, and is nowhere, that I have discovered, doubted or denied.

There never was, in the case before us, any other fund out of which the general legacies could be satisfied, except the specific bequests; and therefore I think it applies strictly to this case. My opinion is in favor of the Petitioners; and an account should be taken of the respective values of the specific and general legacies, and an account of the assets.

Per Curiam.—Let the Master ascertain the value of the specific legacies—and of those to the Plaintiffs—and let him ake an account of the assets not bequeathed.

☞ Upon the distinction between pecuniary and specific Legacies, see the following cases: *Bishop of Peterborough* v. *Mortlock*, 1 *Bro. C. C.* 565.—*Simons* v. *Vallance*, 4 *do.* 345.—*Coleman* v. *Coleman*, 2 *Ves. jun.* 639.—*Roberts* v. *Pocock*, 4 *Ves.* 150.—*Kirby* v. *Potter*, *do.* 748.—*Raymond* v. *Brodbelt*, 5 *Ves.* 199.—*How* v. *Earl of Dartmouth*, 7 *Ves.* 137.—*Sibley* v. *Perry*, *do.* 522.—*Webster* v. *Hale*, 8 *Ves.* 410.—*Deane* v. *Test*, 9 *Ves.* 146.—*Wilson v. Brownsmith*, *do.* 180.—*Lambert* v. *Lambert*, 11 *Ves.* 607.—*Gillaume* v. *Adderley*, 15 *Ves.* 384.—*Mann* v. *Copland*, 2 *Maddock's Rep.* 223.—*Page* v. *Leafingwell*, 18 *Ves.* 463.—*Parrot* v. *Worsfold*, 1 *Jac. & Walk.* 574.—*Smith* v. *Fitzgerald*, 3 *Ves. & Beame*, 5.—*Walton* v. *Walton*, 1 *Johns. C. C.* 258.

John Dawson, Jesse A. Dawson and Martha Dawson,
v.
Sally Dawson, Evelina Alston and George Alston,
From Halifax.

Defective voluntary conveyances, are not aided by a Court of Equity; but those rights which vest under them, are protected.

Where a tenant in common of slaves, voluntarily conveyed all of a particular kind, which might fall to his share upon a division, and then fraudulently contrived that none of that kind should be allotted to him—a division, made with this fraudulent intent, was held to be inconsistent with the rights which the deed vested in the donees.

The case made by the bill was, that *Harry Dawson*, the husband of the Defendant *Sally*, died, leaving a will, by which he bequeathed his negroes to his wife and her sister, the Defendant *Evelina*, as tenants in common, a moiety to each; that letters of administration with the will annexed, issued to the Defendant *George*, a brother of the two legatees. That the Defendant *Sally*, by deed executed the 5th of March, 1824, in consideration of the natural love and affection which she had to the Plaintiffs *John* and *Jesse*, brothers of her deceased husband, conveyed to them all the negroes which belonged to her husband before his marriage, which might fall to her upon a division between her sister and herself. The deed reserved to the donor a life-estate in the negroes, and provided that the donees should pay to the Plaintiff *Martha*, one-third of their value. The bill then charged, that the Defendant *George*, caused a division of the slaves to be made between the legatees, under an order of the County Court. That at the time of making the division, the commissioners were notified of the interest which the Plaintiffs held under the deed from the Defendant *Sally*, and were requested either to make a division by chance, after dividing the negroes into two lots, without any regard to the fact of their being either the property of *Harry Dawson*, or of the Defendant *Sally*, before heir intermarriage; or by allotting them indiscriminately, first to one of the legatees, then to the other; or to divide them in any fair and equitable manner. But that the Defendant *George*, with an intent to render the deed of the Defendant *Sally*, to the Plaintiffs *John* and *Jesse*, ineffectual, fraudulently procured the commissioners to allot the Defendant *Sally*, all those negroes which belonged to her before her marriage, and to the Defendant *Evelina*, all those which, before that time, belonged to the testator, and had delivered the negroes in pursuance of this unjust and fraudulent division. The prayer was, that the division thus made, might be set aside, and the Defendant *George*, compelled to divide the negroes again upon just and equitable principles.

A demurrer to the bill was filed by the Defendants, which was on the Spring Circuit of 1827, sustained by his honor Judge RUFFIN, and the bill dismissed. Whereupon the Plaintiffs appealed. At June term, 1827, the cause was argued, by *Gaston* for the Plaintiffs, and by *Badger* for the Defendants.

Gaston, for the Plaintiffs.

1. The property conveyed by the deed, was an incident to property vested in the Defendant *Mrs. Dawson*, and therefore is the subject matter of an executed contract. (*Fonville* v. *Casey*, 1 *Murph.* 389).

2. But if the contract cannot be deemed as executed, the subject matter of it not being in esse, yet it is a contract executory, and binding upon the covenantee.

3 Whether the contract is executed or executory, as it relates solely to chattels, and is under seal, it requires no consideration for its support, and will be protected from fraudulent combinations.(*Bunn* v. *Winthorp*, 1 *Johns. Ch. Rep.* 329, 336).

If the deed passes an actual interest, we do not come into Court for the purpose of setting it up, but to prevent that interest from being affected by a fraud.

If the deed is only the evidence of an executory contract, we come into Court to have it executed; upon the ground, that by our practice, contracts concerning slaves, though they are chattels, are regarded precisely as contracts concerning plate, family jewels, &c. are in England. A specific execution is decreed as to them, because the market value, which is all that can be recovered at law, is not a compensation.

4. The contrivance whereby the Defendant gets none of the specified slaves, is manifestly a fraud upon the Plaintiffs. It is inconsistent with their rights on the subject—they had not notice of the division, whereas, if it was the intention to make one fairly, they ought to have been parties to it.

Badger for the Defendants.

To enable a party to obtain relief, there must be, 1st. an interest which the Court considers entitled to its aid. 2. An injury to that interest.

The present case is similar to cases to compel the specific execution of agreements. It is not the case of a trust or equitable estate, which, in this Court, is what a legal estate is at law; for the deed has had its operation at law. The Plaintiff comes into this Court to have its effects at law enlarged by a new division, so as to be accordant to what he says, was the intent of the parties. It is then, in effect, to execute an agreement, and to make that agreement more available at law, than it is as matters now stand.

No agreement will be enforced here without a valuable or a meritorious consideration—the latter of which includes only the case of a father providing for a child, a husband for a wife, &c. and never extends to collaterals. (*Newland on Contracts*, 65—*Ellison* v. *Ellison*, 6 *Ves.* 661.—*Coleman* v. *Sarrel*, 1 *Ves. jun.* 50.—3 *Bro. Ch. Rep.* 12 *S. C.*)

In the case of a mere voluntary contract, Equity will do nothing. It will not interfere to prevent a voluntary settler from selling so as to defeat the settlement. (*Pulvertoft* v. *Pulvertoft*, 18 *Ves.* 84, 98.—*Buckle* v. *Mitchell*, 18 *Ves.* 100, 112.)

The practice of the Court in aiding the defective execution of powers, has some analogy to the present case. Powers defectively executed, are aided in a Court of Equity only in favor of a wife, children, purchasers or creditors, but never for volunteers. (4 *Cruise Dig. Ch.* 17). The only exception is, when the remainder-man gets the possession of the deeds, and keeps them from the tenant for life, and the latter appoints, but does not pursue the form. The ground of interference then is, that the tenant for life intended to execute, but was prevented by the wrong of the remainder-man, who claims in consequence of that wrong. There is no case showing that the tenant for life is ever controlled. (4 *Cruise, Ch.* 17, *S.* 33.)

But it is said, that the bill is filed to prevent a fraud from being perpetrated on the Plaintiffs. The use of hard names will not sustain the Plaintiff's case. The bill charges fraud, but shews no right which is entitled to protection. Was the Defendant bound to give any thing? If she had never divided, she could not be quickened. If she is at liberty never to divide, the Plaintiffs cannot complain that their dividend is too small. As the Defendant originally acted without consideration, as it was a mere gift to the Plaintiffs, they cannot complain that they have less than they expected. (*Wallwyn* v. *Coutts*, 3 *Merivale*, 707.)

Gaston, in reply.—It is admitted that Courts of Equity will not compel the specific execution of a contract purely voluntary.

No part of the jurisdiction of the Courts of Equity has been watched with more jealousy by Courts of Law, than that of compelling the specific performance of agreements. Their successful assertion of this jurisdiction, in spite of the struggles of the Law Courts, is attributable principally to the prudent limits within which they have themselves restrained it. They have taken it as a rule to exercise this extraordinary jurisdiction only where it is clearly due in conscience, and Courts of Law cannot give adequate relief. They will not interfere in executing agreements respecting the purchase of personal chattels, as adequate damages may be had at law. They will not compel the specific execution of contracts purely voluntary, but leave them to law, because many of these in law are not even binding, and in the others conscience is satisfied by damages adequate to the disappointment.

If no more appears, a Court of Equity will not compel, as against the maker, the *specific execution* of a *contract ;* but if any interest passes, that interest will be supported in Equity against all. Thus in *Coleman* v. *Sarrel,* the deed purported to assign stock to Trustees for strangers, but an actual transfer was not made. The cutor of the donor filed a bill to set it aside, and the *cestui que trust* a *cross* bill against the executor to compel a *transfer.* The bill was dismissed—cross bill retained for twelve months, until a suit should be brought at law on the covenant to transfer.

This shows if a recovery should be there effected, Equity would protect the interest of the *cestui que trust.*

Ellison v. *Ellison,* was a settlement in trust, with a power to revote the trusts in a specified form. An instrument was set up as a revocation not pursuing those forms. It was objected that the first settlement was voluntary, but the objection was overruled.

In *Wallwyn* v. *Coutts,* it was decided that Equity will not compel a specific execution against donors, in favor of third persons not *parties to the deed.* It was voluntary, therefore not to be enforced in Equity. Persons not parties to the deed could acquire thereby no interest which was protected.

In *Pulvertoft* v. *Pulvertoft*, the Court would not grant an injunction to prevent a donor from aliening for value, for this would be to overrule *stat. 27th Eliz.* But it will sustain and aid the trust until a sale.

This bill is not filed to compel a *specific execution*—it does not ask the Court to decree that *Mrs. Dawson* should *do any act*. It is a bill against the administrator, and to have an act set aside as fraudulent, which has been done *by her and our trustee*, because it is contrary to the executed contract between her and the Plaintiff.

Suppose *Mrs. Dawson* had given her entire equitable interest, either by deed or will—can it be doubted but that the Court would have compelled the trustee, the administrator to deliver the negroes ? (18 *Ves.* 99).

He, the administrator, therefore cannot object to a prayer even for specific execution, and much less to a prayer to have his fraudulent act set aside.

Suppose after such an assignment, the donor or her executor to *release*, the interest *transferred* would be *protected*, and the release set aside.

Suppose, after such an assignment, she should agree to take *money* and no negroes—surely this agreement would be set aside.

Suppose a second assignment purporting to be *for value*—would not a bill lie to have it set aside on an allegation that it was fraudulent. She is made a party, because interested. The bill seeks to set aside a fraudulent and collusive conveyance.

But the fact is, that in our country, as to many purposes, legacies are legal rights. In England, they are not noticed at law. But here the case is different. If it is a legal right, it is conveyed at law, and the interest conveyed will be protected in Equity.

The act done is in violation of the plain intent of the contract.

1st. The words " all that part, &c., that may *fall* to me' clearly indicate an *allotment*, in the ordinary sense of the word, and not " such a part as I may *choose* to take."

That is a vicious construction of an agreement, which leaves the contractor unbound. By the contract, she was bound to give *all of a particular kind*, and it is contended that she has a right to give only what she pleases. This case is very similar to that of *Jones* v. *Martin*, (5 *Ves. jr.* 266 *note.*)

It is also similar to cases of collusive appointments under a power, which are held to be void, and the estate goes as if the power had not been executed, (*Cocklinton* v. *Bayne*, 1 *Bro. Ch. Rep.* 450—16 *Ves.* 26—1 *Madox*, 205.)

Henderson, Judge.—Voluntary executory agreements receive no aid, either from Courts of Law or of Equity. The parties stand upon their rights, such as they are, and hence it is a maxim, that defective voluntary agreements will not be aided in a Court of Equity; any reformation of a conveyance being an execution of the original agreement, so far as the conveyance is varied. The same motive, which induces a Court to refrain from enforcing an agreement, no part of which is executed, prevents it from enforcing any *part* of it. The want of a consideration is therefore universally a good defence to a bill for rectifying a voluntary conveyance, or enforcing a voluntary agreement.

Where, however, the conveyance, is complete, and property passes, or rights are vested by it, that property, or those rights, are guarded and protected, notwithstanding there was no consideration for passing or raising them.

The question presented by this demurrer, therefore, is, does this bill seek for other rights than those created by the conveyance, or does it only seek for the security and protection of those, which the deed has already given to the Plaintiffs?

The deed transfers to the Plaintiffs, such of the slaves as had belonged to the husband of the donor, and which should be allotted to her upon a division between her sister and herself. This is a gift of slaves *in presenti*, who were to be designated by an act *in futuro*. If upon the division, none of the kind were allotted, nothing passed; if any such were allotted, they did pass. The right to call for this division did not arise from any promise made by the donor, that she would divide; for then, it is admitted that a consideration would be necessary to support it—but it arose as a necessary incident to the right of property created by the deed. If anything passed by the deed, it diminished the property of the donor, and destroyed the power of making such a division as she pleased, which, as owner, she possessed before its execution, and imposed upon her the obligation of regarding the interest of the donees. If this is not the case, and she is at liberty to divide as she pleases, the deed might be made by her perfectly ineffectual, as she could at once have assigned to her sister all the slaves which belonged to her husband, and thus entirely defeat the gift. A difference cannot be perceived between such a division, and the one complained of; for it is clearly illusory, and defeats the rights of the donees—if not to the same extent, certainly it does in some degree, which, in principle, is as objectionable as the total frustration of the gift. It has been likened to the case, where a man grants all the corn which he may grow, or, to use the common phrase, *make*, in a particular field. Although he cannot be enforced to cultivate that field, yet he shall not actively interfere for the purpose of defeating his gift or grant, by wantonly destroying the corn growing there. But this, it is said, would be a wanton act, and one to which self-interest does not prompt, as it does in the present case. True, but it is as equally inadmissible to pursue our own interest, at the expence of the rights of others, as it is wantonly to destroy those rights. The principle is, that I may, by a rightful act, take care of myself, although I may thereby injure another. All laws, human or divine, allow this; but I cannot do this by a wrongful act. But this, it is said, is begging the question; and it is insisted, that the division complained of, is not a wrongful act. That act, however, cannot be rightful, which entirely destroys, and renders of no effect, a gift, or transfer passing property; which, if permitted to operate in the usual and ordinary way, would produce a probable benefit to the donee; and it is obvious, that the probable effect of the deed would be beneficial, as it required a combination to prevent its ordinary result.

As soon as this gift was made, if the deed was not a perfect nullity, certain rights were created by it in the donees. It is true, they were contingent, as to the particular subject upon which they would attach; but it would be strange to allow the right, and at the same time place it out of the protection of the law.

Such is my view of the case. I have considered the deed as if fairly obtained, and that there has been a fraudulent combination to obstruct its fair and usual operation. But I must observe, that I have had, and still have, difficulty upon it. I am disposed to overrule the demurrer, without prejudice and without costs.

Hall, Judge.—When it is said the deed in question is voluntary—that it was given upon no consideration, it seems difficult to adduce reasons why the Court should proceed in the case, and grant relief. The old beaten ground, long since occupied by the Courts of Equity—*not to aid voluntary conveyances*, seems to render any reasons that might be urged to show that the bill should be dismissed, both trite and unnecessary.

But fraud in making a division of the negroes is alleged. The deed of gift was certainly given upon a contingency. There was something like a blank to a prize; something like an appeal to the doctrine of chances. If the division of the negroes is set aside for fraud, and there is to be another drawing of the lottery, the managers or commissioners must be instructed, in the next division which they make, in order to protect the interest of the Plaintiffs, or fraud will be again alleged. Indeed, to avoid fraud altogether, an equal division of the negroes ought to be made between *Mrs. Dawson* and her sister. For if we depart from the case, as the parties have made it by the deed, there is no stopping-place between that, and allowing the Plaintiff a full share of the negroes in dispute. The parties themselves might have so inserted it in the deed, but we see they have not done so. And by this mode of proceeding, the Plaintiffs will be placed upon much more favorable ground, than they stand on in the deed of gift made to them. They will, in fact, be made to draw a prize, when they have not paid for a ticket.

I cannot hesitate to say, that the bill should be dismissed.

Taylor, Chief-Justice, concurring in opinion with Judge Henderson, it was ordered, that the decree below be reversed, and the Demurrer overruled, without prejudice and without costs.

Robert Donaldson
v.
The President, Directors and Comp'y of the State Bank, R. Strange, et al.
} From Cumberland.

A deed to a copartnership vests the property in the concern, not in the individual members. Each takes an entirety, and, by his own deed, can only convey his right to the residue after a settlement of the copartnership accounts.

A creditor who takes an incumbrance to secure an antecedent debt, without releasing a surety, is not such a purchaser as is protected by want of notice.

A mere creditor, who has not obtained a lien by judgment, has no right to ask the aid of a Court of Equity, to follow the property of his debtor.

When lands conveyed to D. M. & Co., and also to M. in trust for D M. and Co. were conveyed by M, who died insolvent, indebted to the Company, and without personal representation, to secure his individual debt, *it was held*, upon a bill filed by a creditor of the copartnership, to subject this property—first, that nothing passed by the deed, in the land conveyed to D M. & Co.

Secondly. That the creditor of M. was not a purchaser for value, within the meaning of the rule which protects them when they are not affected with notice.

Thirdly. That no decree could be made, founded on the fact that M. was a debtor to the copartnership, until his state was represented.

Fourthly. That the Plaintiff, not having established his demand, and having no lien, had no right to ask a Court of Equity for assistance.

The bill alleged, that *Robert Donaldson, John McMillan* and *James Thorburn,* in the year 1803, entered into copartnership, under the name and style of *Donaldson, McMillan & Company*—that, in the course of their business, they acquired real estate, which was either purchased upon speculation with the partnership funds, or was taken as security for debts due it. That, from accident or mistake, or because the matter was not considered of importance, the assurances for the land thus acquired, were not always made to the copartnership by its name; but were sometimes thus made, at others to *Robert Donaldson & John McMillan*, as tenants in common, and in some instances, either to *Donaldson* or to *McMillan*, in severalty, as the one or the other happened to be the active agent in the purchase and assurance. That the copartnership was dissolved in the year 1808, by the death of *Donaldson*—hat at the time of its dissolution, it was insolvent, and was indebted to one *Samuel Donaldson*, of London, in a very large sum. That *McMillan* died in the year 1820, also insolvent, and indebted to the copartnership, and that he had no personal representative. The bill then averred, that the executors of *Samuel Donaldson*, who died in the year 1813, for a valuable consideration, had assigned to the Plaintiff, the debt due their testator by *Donaldson, McMillan & Company*—that *Thorburn*, the surviving partner, who was a Defendant, had admitted this debt to be due, and in part payment thereof, had assigned to the Plaintiff, all the interest which vested in him as surviving partner, in the real estate in question. It was then charged, that *McMillan*, before his death, had conveyed the land thus acquired, with the partnership funds, to the Defendant *Strange*, and one *John Winslow*, in trust, to secure the payment of his individual debt due the Defendant, the Bank of Cape Fear; and after discharging that, then, in trust, for other of his creditors—that *Winslow* was dead, and that the land remained in the hands of the Defendant *Strange*, unsold. It was insisted, that *McMillan* was a trustee of the lands thus acquired, for the creditors of *Donaldson, McMillan & Company*, and that the Defendants had notice of that trust. The prayer was, that the Defendant *Strange* might be declared a trustee for the Plaintiff, and be compelled to convey to him all the estate he held under the deed from *McMillan*, and that all other parties having any interest in the land might join in the conveyance.

The heirs of *Donaldson* and of *McMillan*, and also the persons beneficially interested in the declaration of trust made in the deed to *Strange* and *Winslow*, were made Defendants, and either filed formal answers or disclaimers. The bill was taken *pro confesso* as to *Thorburn*. The Defendant the Bank of Cape Fear, admitted in its answer, the conveyance of *McMillan* to *Strange* and *Winslow*, and that it was in trust, to secure a debt due it—that some of the property thereby conveyed, was originally assured to *Donaldson McMillan* and *Company;* but as to the fact that any part of that assured to *McMillan* was purchased with the funds of the copartnership, they denied any knowledge thereof, and put the Plaintiff to the proof of it—and they insisted that they were purchasers for value, and without notice. The Defendant *Strange*, in his answer, insisted upon the same facts, claimed no beneficial interest in the property, and submitted to such a decree as should indemnify him.

The cause was argued by *Gaston and Hogg*, for the Plaintiff, and by *Badger*, for the Bank of Cape Fear.

Henderson, Judge.—This bill is filed by one who claims to be a creditor of the firm of *Donaldson, McMillan & Company*, and also the assignee of *Thorburn*, the surviving partner of that firm. Its object is, to reach certain real estates, mortgaged or conveyed in trust by *McMillan*, one of the partners, to secure an individual debt, before that time owing by him, to the Defendant—the Cape Fear Bank. It alleges, and it is admitted in the answers, that some of the land was held by the copartnership under legal titles, vesting the estate in it. The bill also alleges, that there were other lands, the legal title whereof was in *McMillan;* but that he held them in trust for the firm, having purchased them with the copartnership funds, and for its benefit. The Defendants put the Plaintiff upon proof of this trust, and allege that if there was one, they are purchasers for value, and without notice.

As to that part of the property, the legal title of which is in the company, the Defendant has not the shadow of a claim, until the debts of the firm are paid. Property thus situated, is entirely unlike an ordinary joint tenancy. The partners have no moieties; the property resides in the *company*, not in the individual copartners. Each has only a contingent right to a part, after the debts are paid, and the copartnership ended; and therefore the transfer of one of the partners only passes that contingent right. The copartnership takes the entirety, to pass any thing but the contingent right, that is to pass the estate, the firm must convey, for that is the owner. It is something like an estate, granted to husband and wife; *they* take by entireties, and not by moieties. If the husband grants one-half, or the whole, nothing passes but by estopped, and if the wife survives him she takes the whole, notwithstanding the grant of the husband, for she is not bound by his estoppel. If therefore, *McMillan* is indebted to the firm, to the value of this property, the Defendant can claim nothing, until the debt is satisfied. If the land, the legal title to which vested in *McMillan*, was not held in trust by him for the copartnership, very clearly the Plaintiff has no right. If it was so held, the Defendant took it, subject to that trust, unless he discharges himself from it. He says that he is a purchaser for value, without notice. From the case, as it appears at present, I am inclined to think that the Defendant, the Bank, is not a purchaser for value, but a mere incumbrancer. For what value did the Bank pay for the trust? Nothing; it was to secure a debt contracted before the trust was contemplated. As regards expenditure, the Bank stood after, as it did before the deed. Had the Bank purchased with an antecedent debt, and no matter how old, (I use the word *purchased* in its vulgar sense) the extinguishment of the debt would have been value sufficient. Here the debt remains, as it was before the conveyance. Had the Bank even released endorsers, I presume it would have been sufficient.

But the Court cannot decree for the Plaintiff as a creditor, because he has not obtained a judgment; he cannot pursue the property in the hands of the Bank, without obtaining a lien upon it. He appears as a mere creditor, and nothing is clearer than that a mere creditor cannot pursue his debtor's property in the hands of a third person. Nor can he sustain his claim as assignee, to *McMillan's* part of the property, held by the copartnership, without showing that *McMillan* was indebted to it. However strong the evidence of this fact may be, unless the personal representatives of *McMillan* are before the Court, we cannot examine into it. His insolvency and intestacy will not do in a case like this, for upon his indebtedness, depends the Plaintiff's right. Neither is the Defendant prepared for a hearing. It is quite probable—indeed I am almost satisfied of the fact from the uniform practice, that the Bank had endorsers for *McMillan's* debt, who were discharged upon taking the trust, or mortgage. I am unwilling, therefore, in a case so important as this, finally to decide it, in its present state; but would recommend, that it be remanded, for the purpose of making amendments, and preparing proofs.

PER CURIAM.—Let the cause be remanded to the Court below, each party paying their own costs in this Court.

☞ Upon the respective rights of the copartnership and of the several copartners, vide the following cases: *Fox* v. *Hanbury*, *Cowp.* 449—*West* v. *Skip*, 2 *Ves.* 239 better reported by the name of *Skip* v. *Harwood*, 2 *Swanston* 586—*Hankey* v. *Garret*, 1 *Ves. jr.* 236—*Field* v. —— 4 *Ves.* 396—*Eddie* v. *Davidson*, *Doug.* 650—*Campbell* v. *Mullett*, 2 *Swanston* 551—*Sheriff* v. *Wilkes*, 1 *East.* 48—*The King* v. *Rock*, 2 *Price*, 198—*In Re Wait.* 1 *Jac. & Walk.* 585—*Moody* v. *Paine*, 2 *John. Ch.* 518—*Nicholl* v. *Vandewater*, 4 *Do.* 522—*Waters* v. *Taylor*, 2 *Ves. & Bea.* 299.

Charlotte Ward, Executrix of John D. Ward
v.
John Coffield.
} From Edgecomb.

A legacy which is equal to or larger in value than a debt due by the testator to the legatee, is *prima facie* a satisfaction of the debt.

Where A, devised all his North Carolina property to his son B, and all his Tennessee property to his son D, a resident of Tennessee, and charged all his debts due in North Carolina upon the devise to B, a debt due to D less than the legacy to him, was held to be satisfied by it.

This bill was filed to obtain the advice of the Court, and in order to expedite the cause, a case agreed was made up, of which the following are the material facts.

The Plaintiff's testator formerly resided in the State of Tennessee, where he married and had issue *David C. Ward.* On the death of his wife, he removed to this State, leaving his son *David*, and a considerable property in the State of Tennessee, where *David* has ever resided. In this State he again married, and had issue *Joseph E. Ward*, and died considerably indebted here, and to his son *David* two hundred and fifty dollars, which was the only debt he owed out of this State. By his will, he devised all his North Carolina property to his son *Joseph*, and all that in Tennessee to *David*, and authorised his executors to sell such of his property *in this State* as they might deem necessary and sufficient for the payment of his "*just debts in this State.*"

The question made by the case was, whether the debt due *David* was a proper charge upon the North Carolina estate, or not.

Gaston, for the Plaintiff, submitted the case without argument; no Counsel appearing for the Defendant.

Taylor, Chief-Justice.—*John D. Ward* was indebted to his son *David*, in the principal sum of two hundred and fifty dollars, and devised to him all his property in

Tennessee, which, consisting of real and personal estate together, is of much greater value than the debt so owing from the testator to his son. In order to ascertain whether the legacy shall be construed a satisfaction of the debt, the general rule to govern us is, that a legacy which is greater, or as great as the debt, shall be taken as a satisfaction; and this rule is firmly established, notwithstanding the late cases which decide, that where there are circumstances, or presumptions, that the testator did not intend it as a satisfaction, the Court will lean against the rule. Where these circumstances do not exist, the rule will clearly operate, although it has never been a favorite with the Courts; it being thought strange that if the estate is sufficient for both debt and bounty, the testator should not intend both. There is no circumstance in this case, to repel the application of the rule; but there is on the contrary a clause in the will, from which an inference arises, that the testator was aware of the rule, and meant that it should operate. He makes a provision for the payment of his debts in this State, and none for the only debt he owed out of the State, viz. that his son, from thebelief, probably, that he was paying that debt by the legacy. If therefore, the rule were not applied to this case, it must be disregarded in every other; but this a Court has no authority to do—independently of the evils which would arise from a want of certainty in the law. I am consequently of opinion, that the debt of the testator to his son *David*, is not a charge, either in whole or in part, upon the property in this State.

Per Curiam.—Decree that the legacy to *David C. Ward* is a satisfaction of the debt due him.

Robert Pike
v.
Starkey Armstead and
Thomas Turner,
From Washington.

A subsequent mortgagee, whose deed is duly registered, is bound by a prior unregistered one, of which he had notice.

If a mortgagee for the purpose of keeping up the mortgagors' credit, suffers his deed to remain unregistered, it seems not to be fraudulent *per se;* but its character depends upon the intent. It is not fraudulent as to one who knows the whole transaction.

The papers in this cause were very voluminous; an abstract of the whole of them is unnecessary, as it is thought that the following statement is sufficient to place the points decided by the Court, before the profession. The Plaintiff alleged, that at the request of one *Joel Thorp,* he lent him 700 dollars, to secure which he took a mortgage at six months upon sundry negroes. That *Thorp* urged the Plaintiff to keep the mortgage secret, and not to have it registered within the six months for which the loan was made, as he would certainly repay it within that time—and as its publicity would injure his credit, and cause his creditors to press him immediately. That the Plaintiff, believing *Thorp* to be solvent, as he was in possession of a large visible property, and confiding in his promise of payment, had not procured the mortgage deed to be registered. That the Defendants had direct notice of its existence, being conusant of the whole transaction; notwithstanding which, they had procured a deed of trust, for their benefit, from *Thorp,* in which the negroes mortgaged to the Plaintiff were included. That they had caused this deed to be registered before that to the Plaintiff, and had brought an action at law against the Plaintiff for the negroes mortgaged to him, which he had taken into his possession soon after the expiration of the six months for which the loan was made. The prayer of the bill was for an injunction, and satisfaction of the Plaintiff's mortgage from the property conveyed to secure the Defendants.

The Defendants, in their answers, admitted express notice of the Plaintiff's mortgage—they denied that *Thorp* was generally esteemed to be solvent at the time he gave the mortgage to the Plaintiff, but alleged that he was then, and before that time, had been greatly discredited, and that many executions were hanging over him; that the Defendants fearing they might sustain a loss by him, had made up an estimate of his debts and effects, the result of which being unfavorable, the Defendant *Turner*, had waited upon him and communicated it to him, and had asked for and obtained a conveyance for their security. They insisted that the Plaintiff had fraudulently concealed his mortgage, with the view of giving *Thorp* a false credit, and enabling him to delay his creditors in the collection of their debts, and that they had obtained a fair priority over the Plaintiff, which they submitted they were justified in holding.

The cause was heard upon bill and answer, by his honor Judge Nash, on the Spring Circuit of 1826, who dissolved an injunction previously obtained, and dismissed the bill—from which decree the Plaintiff appealed.

The cause was shortly argued in this Court, by *Badger*, for the Plaintiff, and *Gaston* and *Hogg*, for the Defendants.

Taylor, Chief-Justice.—From the facts and admissions in this case, my opinion is, that the Complainant is entitled to relief. The first question arises on the act of 1715, (*Rev. ch.* 7) relative to mortgages. A mortgage between the parties is valid, although no registration be made, as well from the words of the act, as the uniform construction of it. Its professed design was to prevent frauds by double mortgages, which design is accomplished by giving priority to a subsequent mortgage, if registered before a prior one, unless the latter be registered within fifty days; so that a person about to secure a debt, or to loan money, may by inspecting the register's books, ascertain whether there be a prior incumbrance upon the property, and if there be none, or none registered within fifty days, he may proceed to act, without fear of secret liens of which he knows nothing. The law was designed to give notice to persons so situated; but if it be clearly established in proof, that a subsequent mortgagee had notice of a prior mortgage, although not registered, he shall in Equity be bound by it, although he hath obtained a priority at law; for having this notice, he may protect himself from harm by forbearing to proceed. The words of the English Registry act are stronger than those of the act of 1715, viz.: "and that every such deed or conveyance, that shall at any time after, &c., be made and executed, shall be adjudged fraudulent, and void against any subsequent purchaser or mortgagee for a valuable consideration, unless such memorial thereof be registered, &c." According to the preamble of that act, it was intended to secure subsequent purchasers, *against prior secret conveyances*, and fraudulent incumbrances, corresponding in this respect to the act of 1715. The British act received a construction soon after its passage, which has continued since, without any diversity of opinion; that where a person had no notice of a prior conveyance, there the registering of the subsequent conveyance shall make or prevail against the prior one; but if he had notice of the prior one, then it was not a secret conveyance, by which he could possibly be prejudiced. By this construction, the deed is made void against the subsequent purchaser or mortgagee, whereby they gain the legal estate, but they are still left open to any Equity, which a prior purchaser or incumbrancer may have against them. That the Defendants had notice, before taking the deed of trust, is distinctly admitted; and the remaining question is, whether the purpose for which the mortgage to *Pike* was omitted to be registered, is such a fraud, as to deprive him of his equitable right. It appears to me that the suspicion of fraud, is repelled by the ignorance both of *Thorp* and *Pike*, that the former was insolvent; he was in possession of considerable property, which appears to have been thought by the parties equal to the payment of his debts; his eyes do not appear to have been opened to his true situation, until *Turner* waited upon him, after having made an estimate of his debts and his property. Being engaged in trade, it was of importance that his creditors should not come upon him all at once, which they probably would have done, when they saw he was making liens on his property. Whereas the maintenance of his credit for a while might have enabled him to pay all his debts. It seems to me to be a rigorous construction to impute fraud to the omission of an act, which the law did not require; but if it were so, it is void against those only whom it was intended to deceive. It was impossible that the Defendants could be injured, since they were apprized of the transaction I therefore think that this act for the prevention of fraud, would have the effect of promoting it, if the consciences of the Defendants could not be affected by the notice; or the object of the registry being to give notice, the necessity of it is superseded, as to those who have notice without.

Hall, Judge.—The object of the law in requiring the registration of deeds of trust and mortgage, is to prevent fraud, by giving notice of such deeds to subsequent purchasers and mortgagees, but when they have notice of them in any other way, the object of the law is answered as much as if they were registered, and they have no equitable ground to complain for the want of registration. This is a plain principle of Equity, long acted upon, and easily understood. The authorities on the subject are collected together by *Sugden* in his treatise on the law of vendors, (2 *American, from the 5th London edition*, 511 *n.*)

To apply this principle to the present case, it will follow, that the Defendants having notice of the Plaintiff's lien, have no Equity to avail themselves of its want of registration. I therefore think that the decree below should be reversed.

Per Curiam.—Let the decree below be reversed, and decree for the Plaintiff, with costs both at Law and in Equity.

☞ The Reporter in making the following extract from a late Work of high reputation, does not wish to be understood as impeaching the decision of the Court in the above case, his sole object is to render the Work it is his duty to superintend, both useful and agreeable to the profession.

" Upon the enrolment act of *Hen. VII.*, and the docketing and registering statues, Equity has introduced, under the name of *notice*, a " totally different construction, which has been nearly subversive of " these descriptions of acts, and has raised a complicated system, much " more grievous than any of the individual hardships meant to be redressed.

" They have determined, on the one hand, that a person buying " estate, *with notice*, of a prior incumbrance, *not registered*, shall, in " equity, be bound by it, although he has duly registered his own conveyance. On the other hand, they have held, that a person having " the legal estate as mortgagee, and advancing more money, *without* " *notice*, of a second mortgage *duly registered*, shall hold, in respect " of it, against the second mortgagee. In the former case, an unregistered deed is preferred to a registered one. In the latter registration, " even coupled with priority of time is of no avail. It is indeed, " urged, that the first mortgagee possesses that fiction termed the legal " estate, and that both mortgagees are in *pari delicto.*—But, (passing " the technical advantage) if there be blame in the want of search, the " second mortgagee affects only himself by it, whereas the first mortgagee affects also the second. In analogy to the foregoing resolutions, " it is held in equity, that, although a judgment be not docketed, yet if " a purchaser have notice of it before he completes, he shall be bound " by it. He already possesses, it is said, that information which the " statute intended to furnish him; but to this it might be replied, that " he also knows an undocketed judgment is rendered void against himself; and that the judgment creditor might not have intended to " rely upon the land contracted for. *Humphrey's on Real Preperty* "1 *London Ed.* 154, 155.)

"I will close with observing, that Courts of Equity have not thought "fit to urge their doctrines upon notice, in opposition to decision at "law, that voluntary conveyances are void under the statute of 27 *Eliz.* "to prevent fraudulent conveyances, against subsequent purchasers "*even with notice*, although the argument, that what the purchaser "knew could never be a fraud upon him, is equally strong here as "upon the registry and docketing acts. Neither have they interfered "with the two successive acts for memorializing life annuities sold "for money. Whatever may be the policy of these different acts, it "does not appear that either the justice or the simplicity of the deci- "sions upon them would have been improved by the introduction of "the equitable doctrine of notice. *Ibid.* 160, 161."

Azel Sharpe
v.
Thomas Bagwell. } From Iredell.

Where the payee of a promissory note mutilated it, by cutting off the name of the attesting witness, *it was held* that he was entitled to no relief in a Court of Equity.

The Plaintiff in his bill alleged that the Defendant was indebted to him in a sum of money, secured by two notes, which were attested by two witnesses; that from ignorance that the act would affect the validity of the notes, he cut off the name of one of the subscribing witnesses; that he had brought an action at law on the notes, in which he had failed, in consequence of this alteration; that nothing had ever been paid by the Defendant on account of the debt secured by the notes, but that the whole thereof was still due. The prayer of the bill was for payment of the debt due the Plaintiff by the Defendant.

The Defendant in his answer, admitted the execution of the notes as charged in the bill, but averred that they were given upon an usurious consideration, which he could only prove by the witness whose name had been cut from them. He insisted that the Plaintiff had mutilated the notes with the view of depriving him of this testimony, and prayed all the benefit of the legal defence arising either from the usurious nature of the contract, or from the mutilation set forth in the bill.

A replication to the answer was filed, and proofs taken, but they are not necessary to the elucidation of the case.

The cause was submitted by *Wilson*, for the Defendant, no Counsel appearing for the Plaintiff.

Taylor, Chief-Justice.—It is of great consequence to society, that written contracts should be preserved free from every circumstance of suspicion. The old cases have laid down with much precision, the law relative to deeds, that *any* alteration by the obligee will avoid the deed, as well as any alteration by a stranger in a material part; and modern cases have extended the rule to bills of exchange and promissory notes, in which it is still more applicable, from the number of hands through which they may pass. If the alteration might be made with impunity, with the chance of gainihg if successful, and not losing in the event of detection, it is probable such attempts would be frequently made, and nothing is more likely to check them, than its being understood, that by tampering with a written instrument the creditor loses his debt. Courts of Equity have, from an early period, acted on the principle of presuming every thing *in odium spoliatoris.* In the time of *Lord Ellesmere*, a decree was made against a Defendant for an estate, upon the ground that he was vehemently suspected of having suppressed a deed, *Lord Hansdon*, v. *Lady Arundell*, (*Hob.* 109) and many cases hav since occurred in Chancery, and decided on the same ground.—(*Sanson* v. *Nunnery*, 2 *Vern.* 561—*Hampden* v. *Hampden*, 1 *Bro. P. C.* 250—*Dalton* v. *Coatsworth*, 1 *P. W.* 751).

The alteration of this note was in a most material point, tearing off the name of that witness by whom alone the consideration of the contract could be proved. If after a spoliation of this kind, Equity would relieve the creditor, it would encourage others in like circumstances, to repeat the experiment.

I remember a case, tried when I was at the bar, the ultimate decision of which in the Superior Court, was believed to be entirely correct. The suit was instituted in the County Court, against executors on the bond of their testator. Between him and the Plaintiffs there had been other dealings by open accounts, and some payments made, which though directed to be applied to the credit of the bond, were credited to the open account.—The subscribing witness to the bond had been called on to witness this direction, and the Defendant's Attorney having pleaded *non est factum*, required the presence of the witness. But after the case was put to the Jury, the Plaintiff's Attorney tore off the name of the witness, and the Court allowed him to prove the obligor's handwriting. Upon appeal to the Superior Court, it was ruled without hesitation, that the mutilation had destroyed the bond. The obligee afterwards made an unsuccessful attempt to recover the money in Equity. I think the bill should be dismissed with costs.

HALL, Judge.—The Complainant states, that he had no bad motive in view, when he cut off the paper from the instrument on which the witness's name was written. This may be true ; but as it is difficult to fathom men's motives, particularly when contradicted by their acts, and as others may hereafter say their intentions were equally pure, when they acted from the most selfish ones, and as a general rule of conduct must be laid down for all, therefore, the law will not permit a man to explain his motive when he does an act in which he is so much interested as the Plaintiff was in the present case. But it judges of his motive from the act done. By cutting off the name of the witness, the instrument might have been proved by the other witness, without running any risk of bringing to light the usurious consideration, on which the note is charged to have been given.

I have no hesitation in saying the bill should be dismissed with all costs.

Per Curiam.—Let the bill be dismissed with costs.

In the matter of James Dozier's heirs, upon the petition of Jas. P. Hughes and wife, } From Currituck.

Where land is sold for the purpose of partition, the share of a feme covert in the proceeds, is considered as realty, and cannot be paid to her husband, except she directs it upon a private examination.

From the petition and exhibits, it appeared that the lands of *James Dozier* had been ordered by the Court of Equity for the county of Currituck, to be sold, for the purpose of partition; that one *Dennis Dozier*, the husband of one of the persons entitled to the proceeds, had purchased them, and that, upon the confirmation of the sale, the Master was directed to credit his bond, given to secure the purchase-money, with the amount of his wife's share thereof. The petition then stated, that *Dennis Dozier* had died, and that the petitioner, *James P. Hughes*, had intermarried with his widow, and it prayed that the share of the wife might be paid to the present husband.

No Counsel appeared in this Court.

Hall, Judge.—No doubt the money coming to the wife of *Hughes*, is to be considered as land. But her present husband has no better title to it than her first had. To entitle him, it is indispensable that she should be privately examined, touching her assent that he should have it; or that she be examined in some way such as the Court shall direct, equally solemn as that prescribed upon a conveyance of her real property. When this is done, I see no objection to granting the prayer of the petition.

Per Curiam.—Let the cause be remanded, at the cost of the Petitioner.

James Allen,
v.
The Buncombe Turnpike Company, } From Buncombe.

Where the Legislature authorised one to open a road and collect tolls on it, a subsequent authority for a similar purpose to another, is valid, although it may diminish the profits of the first road.

The case made by the bill was, that the Legislature in the year 1801, granted to *Job Bernard* and *Philip Hoodenpile*, the right of opening a turnpike from the house of *William Hunter*, in Buncombe county, to the Tennessee line, and authorised them to erect gates on the road, and collect toll from persons travelling on it. That the grantees, at great labor and expense, had opened the road as they were thus authorised, and had rendered it passible to travellers. The bill then set forth a partition of the road between *Hoodenpile* and *Bernard*, and a conveyance to the eastern half thereof to the Plaintiff. That the Legislature, by an act passed in the year 1819, had recognised the property of the Plaintiff in the road, and in consideration of the great expense which he had incurred upon it, had extended the term during which he was authorised to collect tolls thereon, until the year 1831 The Plaintiff alleged that he had faithfully performed his duty to the public, by keeping his road in repair, and that he had done nothing to forfeit his franchise. But that the Legislature, in the year 1824, had incorporated several individuals, by the name and style of " The Buncombe Turnpike

Company" (the Defendant had authorised them to survey and "open a road from the Saluda Gap by the way of Smith's, Murrayville, Ashville and the Warm Springs, to the Tennessee line." That the route thus pointed out, within which the franchise of the Defendant was to be exercised, interfered with that of the Plaintiff, and that the grant to the latter being the oldest, the Legislature did not intend to affect it by the grant to the Defendant. That the Buncombe Turnpike Company had recently surveyed and laid out a road, upon the route they were authorised by the act incorporating them, to open—which after following the road of the Plaintiff, left it about three miles from its commencement at *Hunter's*, and then diverged from it in such a manner, as greatly to injure the Plaintiff in the profits of his franchise, by enabling travelers to pass round his toll gates. The Plaintiff prayed that the Defendant might be enjoined from using any part of his road, and from entering thereon with the view of opening a road, which would divert travelers from his gates.

A full answer was filed, but as the case was decided upon the allegations of the bill alone, it is unnecessary to give an outline of it, or of the mass of documents filed as exhibits.

The cause was heard upon bill and answer, by his honor Judge NORWOOD, who dissolved an injunction previously granted, and dismissed the bill without costs, from which decree, the Plaintiff appealed.

Gaston, for the Plaintiff, contended, that the acts complained of were plainly injurious to the Plaintiff, and that his appropriate remedy was by injunction. He insisted that the Plaintiff being in possession of a franchise, it could not be taken from him even for the convenience of the public, without giving him an equivalent. For this he cited (*Croton Turnpike Company* v. *Ryder*, 1 *Johns.*

Ch. Rep. 611—*Ogden* v. *Gibbons*, 4 *Do.* 150—*Newbur Turnpike Company* v. *Miller*, 5 *Do.* 101.)

Wilson & Badger, contra, admitted that the Legislature, after granting a franchise, could not retract that grant, and give the same individual franchise to another. But they insisted that the Legislature had a perfect right to grant another franchise of the same kind, if the public convenience required it, of which they were the only judges. They contended, that the cases cited had no application, being cases in which were private individuals, without a grant from the sovereign, had undertaken to do acts inconsistent with rights granted by that sovereign.

Hall, Judge.—The Plaintiff does not charge in his bill, that the Defendants are about to divest him of a right, acquired under the act of assembly, to his turnpike road, or that the act of incorporation authorises them to do so; but that, in all probability, the travelling custom will withdraw from his road, and a preference be given to that opened by the Company; and that his road is to be travelled over about three miles, before that of the Defendant's commences.

With respect to the last objection, it may be answered, that the Defendants by passing over his road, do not divest his right; he can charge them, or any other persons, who travel it *pro rata*, for that distance, as well as a full price for using the whole of it.

As to the first objection, that the profits of his road will be diminished by the location of the Buncombe Turnpike Road in his neighborhood, it may be answered, that it is the province of the Legislature, to establish roads wherever they think the population and convenience of the country require it; and that private interest and individual convenience must yield to the public good. It is not to be presumed on slight grounds, that the Legislature would incorporate a company to open a road for the purpose of oppressing an individual, or for any other object, except that of advancing the convenience of the community. Neither had the Plaintiff a right to expect, when the grant was made to him, that no other of a similar kind would ever be made to any other person, in the same section of the State.

Improvement is the result of experience and observation, and the Legislature, collected from all parts of the State, have a constitutional right to avail themselves of these means of knowledge. They have done so in the present case, and their *will* must be the law by which it is to be governed. If the profits alone of the Plaintiff are to be consulted, probably they would be lessened, if another road was opened any where within a day's ride of his. Surely this cannot be the rule by which the case is to be decided. It is unnecessary to descend to the particular circumstances of this case, as set forth in the bill, answer and exhibits. I think the general principles advanced sufficient to decide that the bill should be dismissed.

PER CURIAM.—Affirm the decree below, except as to the costs, and decree that the Plaintiff pay the costs below, and in this Court.

Kezanah Picket and others
v.
Susannah Johns and others, } From Rutherford.

Same Defendants as Plaintiffs
v.
Same Plaintiffs as Defendants.

Upon a bill filed in this State, to execute a decree made in South Carolina, *it was held,* TAYLOR Chief-Justice *dissentiente,* that the Courts of this State have a right to examine into the merits of the decree as upon a bill of review

Where a resident of South Carolina, upon separating from his wife, gave her a *post mortem* bond for her own benefit, and that of their children, and died in South Carolina, having voluntarily conveyed land in this State to illegitimate children, *it was held,* TAYLOR Justice dissenting, that a decree of the Chancery of South Carolina, declaring this conveyance to be void against the wife and children, was a nullity, the subject matter being without its jurisdiction. Whether the land conveyed to the illegitimate children is liable to be taken for the satisfaction of the bond, Query?

In such a case, it seems that subsequent advancements, made by the father to the children provided for by the bond, are considered as a satisfaction of it *pro tanto,* and it is clear, that land charged with the payment of his debts is to be exhausted, before a Court of Equity will subject property conveyed, or bequeathed to the illegitimate children.

The bill was filed by *Kezanah Picket* and her trustees. The Plaintiffs alleged, that one *Micajah Picket,* the husband of the Plaintiff *Kezanah,* after the marriage between them had subsisted for many years, and after a number of children had been born to them, commenced an adulterous intercourse with the Defendant *Susannah,* which extended so far, that in the year 1800, he separated himself entirely from his wife and family, and withdrew his support and protection from them.—That upon this event, *Micajah* agreed with the Plaintiff *Kezanah,* upon condition that she would not molest him with lawsuits, and would during his life, relinquish all claim to a support out of his estate, at his death, to cause a sum of money equal in value, to the property he took with him at the time of the separation, to be paid her for her own use; and that of several of their children. That in pursuance of this agreement, the Plaintiff *Kezanah*, on the 12th of December, 1800, executed to her husband *Micajah*, a bond with sureties, in the penalty of $6,000, conditioned not to molest him with lawsuits, or to claim a support from his property during his life. At the same time, both *Kezanah* and *Micajah*, executed a conveyance, whereby certain slaves and other property, were settled upon six of their children, and on the 10th of January, 1805, *Micajah* having ascertained the value of the property he carried off with him, executed to the Plaintiff *Kezanah*, his bond in the penalty of $30,000, conditioned to be void upon the payment to her after his death, of the sum of $9,850, with interest, which sum of $9,850, was to be divided between the Plaintiff *Kezanah* and three of her children, not provided for by the deed of December 12th, 1800, in certain specified proportions. The Plaintiff *Kezanah* averred, that she had strictly complied with the conditions upon which this bond was executed, and had not molested her husband with lawsuits, or claimed a support from his property; but that her husband had used every stratagem in his power to deprive her of the benefit of this settlement, and particularly, that he had conveyed to one *James McKinney*, who was a Defendant, and who had married an illegitimate daughter of *Micajah* by the Defendant *Susannah*, a large proportion of his property, consisting of slaves and of a tract of land in Rutherford county, upon a pretended sale, but in fact upon a secret trust, to hold it with its increase, and accumulations, for the benefit of the Defendant *Susannah*, and her children by *Micajah*. That *Micajah Picket*, died in the year 1822, having by will, devised the whole of his estate, except some small legacies to his children, by the Plaintiff *Kezanah*, to the Defendant *Susannah* and her illegitimate children, and appointed *McKinney* and one *Hiram Whitehead*, his executors. It was then averred in the bill, that the testator *Micajah* died at his usual residence in the State of South Carolina, which was also the domicile of the Plaintiffs, and one of the executors and most of the legatees, and where the greater part of his property was situate; that the plaintiffs had filed their Bill in the Court of Chancery of that State, against the executors and legatees, who were all personally served with process and contested the suit; that upon the hearing of the cause, the Court decreed that the bond delivered on the 10th of January, 1805, by *Micajah Picket* to the Plaintiff *Kezanah*, was in Equity binding upon volunteers—and that the settlement made on the 12th of December, 1800, by *Micajah and Kezanah Picket*, of slaves and other property upon six of their children was valid, so far as respected volunteers claiming under *Micajah*. That the deeds made by the testator *Micajah* to *McKinney*, of slaves and land in the county of Rutherford, were fraudulent, and void against the claim of the Plaintiffs; and also that the Plaintiffs should have satisfaction for the amount due upon the bond delivered to the Plaintiff *Kezanah* by the testator, out of the property of which he died possessed, and out of that conveyed to *McKinney*, so far as the same was within the reach of the process of the Court. It was then charged, that a large sum remained due upon that decree, after exhausting the property of the testat tor within the jusisdiction of the Courts of South Carolina; that the present Defendants, who were the executors and legatees of *Micajah Picket*, with a view of evading that decree, had removed some of the personal property to this State. The Plaintiffs prayed a discovery and account of all the property which the Defendants had received from *Miac jah Picket*, and that they might have execution against the same, or any other property of the testator within this State, to satisfy the balance due upon the decree of the Court of Equity for the State of South Carolina.

The Defendants, who were the executors and legatees of *Micajah Picket*, in their answer, admitted most of the material facts set forth in the bill. They contended, however, that the decree which the Plaintiffs had obtained in South Carolina, had been satisfied either from sales made of the testator's property in South Carolina, or by advancements made to the children of *Kezanah*, who were entitled to a part thereof, by the testator, either in his lifetime or by his will—they insisted that the bonds and deeds executed by the testator and the Plaintiff *Kezanah*, and set forth in the bill, were intended for the adjustment of family disputes, and should be considered as a family settlement ; they, therefore, insisted that all advancements made by the testator, either by the will or otherwise, to any of his children by the Plaintiff *Kazanah*, should be considered as a satisfaction *pro tanto* thereof, and as equivalent for the property settled upon his children, by the deed of December 12th, 1800.

The Defendant *McKinney*, admitted the conveyance to him, by the testator, of a tract of land in Rutherford county, and certain slaves ; he contended that he was a purchaser for value, as in consideration of the conveyance he had agreed to attend to the estate for the term of ten years, working thereon himself, together with the negroes conveyed to him, and one of his own, to keep an account of the profits of the plantation, and at the end of the term, to convey five-sevenths of the original value, together with an increase and accumulation, to five children of the testator by the Defendant *Susannah*. The other Defendants, who were the children of *Susannah*, some of whom were infants, insisted that they were creditors of the value of their labor, and claimed the possession of their legacies until they were severally satisfied the amount thereof.

The will of *Micajah Picket*, and a copy of the record of the suit in South Carolina, were filed as exhibits. By the first, it appeared that he devised property of different kinds to the Plaintiffs, who were his children, and charged his debts upon his lands in the county of Buncombe. The contents of the latter have been anticipated in giving a statement of the bill and answers. It appeared, however that several of the Defendants were infants, and answered by their guardian; but no day was given them upon their full age to show cause against the decree.

The cross bill prayed a discovery and an account of the advancements made by *Micajah Picket* to any of his children.

Replications were taken and proofs filed; they principally related to the amount of the advancements, which the Defendants insisted should be brought into account.

Gaston & Badgér, for the Plaintiffs in the original bill, contended,

That the decree made in South Carolina, was conclusive upon this count—that proceedings in Courts of Equity were as fully embraced by the constitutional provision and the act of Congress upon that subject, as those of a Court of Law. (*Mills* v. *Duryee*, 7 *Cranch* 481.—*Hampton* v. *McConnell*, 3 *Wheaton* 234.)

That, independently of the constitutional provision, upon principles of national comity, it is presumed to be correct, until plainly impeached.

It does not appear judicially to the Court what is the law administered in South Carolina; but admitting it to be that of the English Chancery, the decree is correct. Chancery does not aid pure volunteers; but it enables those whose rights are founded upon what is termed a meritorious consideration, to assert them. Conveyances made without a valuable consideration, to a wife or children, are enforced in England, against those which are purely voluntary. (*Coleman* v. *Sarel*, 3 *Bro. Ch. Rep.* 12. 1 *Ves. jr.* 50.—*Taylor* v. *Jones*, 2 *Atk.* 600, *Ambler* 468.)

But here, there is a consideration of actual value moving from the wife, which is sufficient even at law, to support a promise to her children, viz. : the abandonment of all right to a support at the hands of her husband.

Wilson, for the Defendants, contended strenuously, that the lands in Rutherford, were not liable to satisfy the decree, and he insisted that this Court was not bound to enforce the decree made in South Carolina, unless they were satisfied with the principles upon which it was founded. It can have no greater obligation here, than it has in the Courts of South Carolina, and there it can be reversed, either upon a bill of review, or a petition for a re-hearing. He contended, that the whole matter, as it regarded the land in this State, was *coram non judice*, and void. Besides, the decree was plainly erroneous, as it was pronounced against infants, and they had no day given them to show cause against it. But it was also incorrect in the law which it administered, if we take it for granted, that the Courts of Equity in South Carolina, are governed by the rules of the English Chancery. In England, when both parties have the same merits, Equity does not interfere between them, but leaves them to assert their rights at law. Thus, where both the parties are purchasers, the equity being equal, the law must decide. So also, when both are volunteers, he who has the legal title must prevail. (1 *Fonblanque* 335 *to* 350.) Executed voluntary agreements, prevail against those which are executory. (*Bunn* v. *Winthrop*, 1 *Johns. Ch. Rep.* 329.)

The bond given to the Plaintiff in this case was purely voluntary, if not as to the mother, surely it was so as to the children. But a bond given to the mother of an illegitimate child, is supported in Equity; and where property is given to an illegitimate child, who is in possession, no instance can be found where it has ever been taken away, except for an actual creditor. (*Bunn*

v. *Winthrop.*—*Annandale* v. *Harris*, 2 *P. W.* 432—*Rider* v. *Kidder*, 10 *Ves.* 360).

Here, then, there are two sets of volunteers, with a moral obligation on the part of both, on him under whom they claim; the one with a legal title, and in possession; the other with a mere executory agreement. Under these circumstances, the law must prevail.

Hall, Judge.—I am willing to give to this decree all the obligatory force, which is attached to it in South-Carolina; and there, it is binding upon the parties, while it remains in force; but it is not unalterable. I suppose it may be reversed there, in whole or in part, by bill of review, either for error in law, or for matter of fact, properly brought before the Court. It cannot be more obligatory here than it is there. If it could be reversed there, and the cause of reversal is apparent to this Court, where the execution is prayed for, that cause of reversal may be examined, as if it was re-heard upon a bill of review. This Court has no other way of coming at it; however I give no opinion on this part of the case, because I concur in the principles, upon which the decree is based. I think the contract between *Micajah Picket* and *Kezanah* his wife, in the year 1805, was founded on a good, and meritorious consideration. That in point of obligation it is more than equal to settlements, made after marriage; because in this case a compensation for the injury he had done her, the continuation of which was contemplated for the rest of his life, viz: in withdrawing his protection from her, and witholding from her anything like a suitable support, formed a consideration in addition to that upon which such settlements are supported. The settlement upon the children was also founded on a meritorious consideration, and the more to be enhanced, as it announced that a father's care was about to be withdrawn from them also.

The decree in part has been executed in South-Carolina, and it remains to be executed in this State; and the Plaintiffs are entitled to a decree for that purpose. But what property shall be liable to that decree, is made a question. It is admitted, that the Buncombe lands are liable, as well as other property which belonged to the testator, undisposed of at his death.

I think it equitable, that any donations made by *Picket* to the Plaintiffs, after the date of the contract, should be brought into the account.

It is contended, that the lands in Rutherford are not liable. These lands were conveyed in the year 1817, to the illegitimate children of *Micajah Picket*, but not upon a valuable consideration. The conveyance was voluntary, and I am inclined to think they are liable. It is held, in *Taylor* v. *Jones*, (2 *Atkyns* 600) that a settlement on a wife and children after marriage, is a valuable consideration as to the husband, and even against a voluntary conveyance. If a voluntary conveyance is made, and there is a defect in it, so that it cannot operate at law, equity will not decree an execution of it; but if it is intended as a provision for younger children the rule is different. (*Allen* v. *Arme*, 1. *Vent*. 365. *Coleman* v. *Sarel*, 1 *Ves. jr.* 54—*Ibid*, 3 *Bro.* 14—*Cases in Equity ab*. 24—*Bacon's Abr. Agreement. B*. 2).

From these authorities, it would seem that the lands in Rutherford are liable to the Complainants' demand. But if the Defendants have enhanced their value by labour, that additional value should be brought into the account. On these different points, a reference should be made to the Master.

Henderson, Judge.—I mean not at present, to express an opinion upon the conclusiveness of the decree of the Court of South-Carolina, upon matters within its jurisdiction; but I am inclined to believe, that it stands before us as upon a bill of review, liable to be reversed for error in law apparent upon its face, or to be impugned by facts since discovered. Greater sanctity cannot be claimed for it here, than is given it in the State, where it is made, and there, I presume, it may be reviewed and reversed for error. And if it cannot be resisted here, when attempted to be enforced by bill, our Courts would be open to enforce the decrees of other States, and shut to an examination of their errors; for we cannot bring them before us by bill of review. This is in accordance with the Constitution of the United States, and the act of Congress; it is giving the decree the same faith and credit here, that it has in the State where it was made. (*Baker & Child*, 2 *Vern.* 227.—*West* v. *Skip*, 1 *Ves. sen.* 245). But whatever may be the effect of the decree, or judgment of a Court, either of our own or another State upon a matter within its jurisdiction, it is clear, that upon a matter without it, the decree or judgment is a nullity every where; for all the faith attached to them, arises from the fact, that the Court is authorised and appointed *by law* to act upon the subject.

I think, that part of this decree was given upon a matter within the jurisdiction of the Court, and part upon a matter without it. It was competent to the Court to set up the contract between *Picket* and his wife, to order its payment by the executor and legatees of *Picket*, out of the assets of the estate, wherever situated, and to remove every obstruction to the process of the Court, issued for the satisfaction of the decree. These Defendants, as legatees of *Picket*, are affected by the decree, and it is evidence against them, so far as they claim any thing under the will. But as donees, or grantees of the Rutherford lands, I think that the decree affects them not; for, with great respect and deference for the distinguished gentleman who pronounced it, I think the Court had no jurisdiction. For although it is admitted, that the Court, having the power to make a decree, has, as incidental thereto, the power of making that decree effectual, and may, by virtue of that incidental power, remove every obstruction to the process of the Court, in carrying it into execution; yet this incidental power can be carried no higher than the source from which it arises—the right to enforce the decree. If therefore, the obstruction did not, in fact, impede the process of the Court, the Court had no right to interfere with it, or pass upon it. It is the fact of obstruc tion, which gives rise to the power of removal. In this case, the obstruction arose from the locality of the lands, and not from the claim of the Defendants. Therefore, all that was said or done, in regard to the Defendants' title, and everything else in relation to them, as donees or grantees of these lands, is a perfect nullity. But to expedite the business, the clerk and master will take an account of all payments, advancements or donations, made by *Picket* to the Complainants, or either of them, since the deeds of 1805. He will also take an account of the value of the labour and services of the Defendants, the illegitimate children, which came to the use of *Picket*, deducting the expenses of rearing them; for as they are deprived of the charities of children, they are entitled to the rights of strangers. He will also take an account of the consideration paid, or given upon the deed of 1816, and report to next Court. The Sheriff of Buncombe will sell the Buncombe lands, upon the premises, upon a credit of one, two or three years, giving forty-one days notice at the court-house, and five other public places, and report to next Court.

TAYLOR, C. J. *dissentiente.*—If the assistance of this Court were sought to effectuate a decree of a foreign Court of Chancery, the merits of it would be open to examination, and we should be convinced of its justice and propriety, before we proceeded. Like a foreign judgment at law, it would be but *prima facie* evidence of the justice of the demand. But when the Constitution of the United States has declared, that " full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state ; and the Congress may by general laws, prescribe the manner in which such acts, records and proceedings, shall be proved and the effect thereof." And further, where by the act of 1790, ch. 11, Congress did provide for the mode of authenticating the records and judicial proceedings of the State Courts, and then declared that the " records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every Court within the United States, as they have by law or usage in the Courts of the State, from whence the said records are, or shall be taken." I do not see how, in point of effect, a final decree can be distinguished from a judgment at law, for the term " judicial proceedings" includes both ; and if this decree would in South Carolina be deemed conducive on the rights of the parties, it must be so here, so far as the Court of Chancery in South Carolina had jurisdiction. It has been said by an eminent Judge, that as to foreign sentences or judgments, there " is only one way in which they are examinable, and that is where the party who claims the benefit of it, applies to our Court to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory perhaps in the conntry in which it was pronounced, nor as obligatory to the extent which by our law sentences and judgments are obligatory, not as conclusive but as matter *in pais*, as a consideration *prima facie* to raise a promise, we examine it as we do all other considerations of promises, and for that purpose, we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law. In all other cases, we give entire faith and credit to the sentences of foreign Courts, and consider them as conclusive upon us." (*Ld. Eyre, C. J. in Phillips* v. *Hunter*, 2 *H. Bl.* 410.)

In considering the effect of a judgment or decree, pronounced in another State, and duly authenticated here, it appears to me that the only question open for discussion is, whether the Court had jurisdiction of the cause and the parties. So far as the Court pronouncing them had jurisdiction, they are entitled in this Court to "full faith and credit;" the jurisdiction of the Court only, and not the merits of the judgment or decree are enquirable into.

The Defendants were made parties to the suit in Chancery, in South Carolina, and so far as their rights were decided upon in that decree, I hold it to be of the same conclusive character, as if pronounced by a Chancery Court in this State; and that we are not permitted, under the Constitution, and the act of Congress giving effect to it, to pronounce a different decree upon any of the rights of the parties then brought into contestation. That the infant Defendants were not allowed a day, after their attaining full age, to show cause against the decree, may be, and I think is, a cause for reversing it upon a review in South Carolina; but when the decree comes before us unreversed, we cannot, on account of that objection, withhold from it faith and credit, any more than in an action of debt upon a judgment in another State, we could refuse to sanction it, because there were errors on the face, unconnected with the Court's jurisdiction. Though the decree of the Court of South Carolina could only operate *in personam*, as to the land lying in this State, yet now that this Court is called upon to carry that decree into effect, they ought to do so, to the extent of jurisdiction possessed by the South Carolina Court. After a minute examination of all the cases on this subject, the result is thus expressed by the Supreme Court of the United States; that in a case of fraud, of trust, or of contract, the jurisdiction of a Court of Chancery is sustainable whesever the person be found, although lands not within the jurisdiction of that Court may be affected by the decree. (*Massie* v. *Watts*, 6 *Cranch* 160). This is a case of the description and character, on which that Court had a right to pronounce an opinion ; but my brothers do not view the subject in this light, and therefore the reference must be entered up, as they have directed.

EQUITY CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

NORTH-CAROLINA,

JUNE TERM, 1828.

Isaac Williams, Adm'r. of John Williams,
v.
John Washington, David Thompson and others,
From Johnston.

Where there are two creditors, one of whom can obtain satisfaction only from the visible property of the debtor, and the other can subject not only that, but a special fund created for his indemnity; although a Court of Equity will compel the latter to resort to the special fund, or will subrogate the first to his right to that fund, yet the first creditor must demand this, before the latter has received satisfaction from the visible property. If he waits, he has no equity against a third creditor who obtains an assignment of the special fund.

In equity, a surety, in respect of his liability, is regarded as a creditor, and has a right to all the privileges of one.

The bill alleged, that the Plaintiff's intestate, *John Stevens*, *Robert H. Helme* and *Ray Helme*, entered in to copartnership in the year 1816. That upon the death of *Stevens*, and the Plaintiff's intestate, the copartnership was dissolved, and a bill was filed in the Court of Equity for the County of Johnston, for a settlement of the partnership accounts. That the Master reported in that suit, that the copartnership was indebted to *R. H. Helme* to the amount of $6473 76 cents; and that it was also indebted to the State Bank of North Carolina to the amount of $10,139 25 cents, and to the Bank of Newbern in the sum of $9000. That both of the debts due the Banks were, at the time of making the decree in that cause, in judgments, and that executions thereon were then levied upon the separate property of the Plaintiff's intestate, and of *Robert H. Helme*—as the business of the copartnership had resulted in a heavy loss, and *Stevens* and *Ray Helme* were unable to bear any part of that loss.

It was then charged, that in the progress of the above suit, the Plaintiff distrusting the solvency of *R. H. Helme*, an agreement had been made between them, whereby it was settled that the latter should take an assignment of certain debts due the copartnership, in satisfaction of the above sum of $6473 76, due him, and among others, of a debt due the copartnership by *Stevens*, one of the partners, amounting to $1800. That the amount of the property so assigned, and certain property of the partnership, should be sequestered, and the amount of the debts when collected, and the proceeds of the property when sold, should be paid into the office of the Master, "and by him immediately paid to the satisfaction of said executions, as so much advanced and paid by the said *Robert H. Helme*," and that this agreement was incorporated into an interlocutory order made in the cause.

The bill then alleged, that the Plaintiff's intestate was bound as surety for *R. H. Helme* to the State Bank, in an individual debt, for the sum of $5819, upon which there was also a judgment at the time of making the above-recited agreement, and execution thereon was then levied upon the real and personal property of *R. H. Helme*.

The bill then charged, that the two Banks had refused to receive satisfaction of the above-mentioned debts, due them by the copartnership, from the fund thus created, but had elected to enforce satisfaction out of the separate and private property of *R. H. Helme*, and out of the assets in the Plaintiff's hands: and that the amount thereof had been discharged by an execution sale of the assets in the hands of the Plaintiff, and of the visible property of *R. H. Helme*, in the proportions for which they were respectively liable, viz. one-half by each. But that in consequence of the satisfaction of *R. H. Helme's* portion of the copartnership debts, from his visible property, and from the fact, that the executions thereon had a priority over that upon the individual debt of of *R. H. Helme* for $5819, above-mentioned, the Plaintiff had been forced to pay, as surety for the last mentioned debt, the sum of $4877, and he insisted, that had the Banks elected to receive satisfaction for the debts due by the copartnership, *pro tanto*, from the fund created by the agreement, and the decree above set forth, that the visible property of *R. H. Helme*, aided by the fund thus created, would have been amply sufficient to indemnify the Plaintiff against loss, by reason of the above stated suretyship of his intestate.

The Plaintiff insisted, that he had a right to the use of the fund created by his agreement with *R. H. Helme*, to indemnify him against the loss he had sustained as surety, and charged that *Helme*, instead of assigning it to him, had assigned it to the Defendants, to secure a debt which he owed them; and that the Defendants had full notice of the equity which the Plaintiff had, to the property thus assigned them.

The prayer of the bill was, that the Defendants might be decreed to be trustees of the property assigned them, for the Plaintiff, and directed to account with him, for the sum which they had received under their assignment.

The State Bank, and *R. H. Helme*, were also made Defendants; but no decree was prayed against them, the Plaintiff only praying permission to use the name of the President and Directors of the State Bank, in collecting the fund created by the decree.

A demurrer for want of equity, was filed by *Washington & Thompson*.

The cause was argued at June term, 1827, and retained under advisement until the present term.

Seawell & Gaston, for the Defendants.

The surety in this case cannot assert a right to the fund assigned to the Defendants, on the principles of substitution, because the creditor never had a right to that fund.

It is admitted that the surety, on paying the debt, has a right to be subrogated to his creditor, to use the means, to have the assurances, and to avail himself of the remedies which the creditor possessed, to enforce payment from the principal debtor. But the creditors of the Plaintiff had no fund, no special assurance, no peculiar remedy, to which the Plaintiff can be substituted. The creditor had a judgment against *Helme*, which entitled him to receive satisfaction out of *Helme's* property, and so far as that property extended, not being embarrassed by older executions, the surety has a right to claim that it be used for his indemnity. Certain debts due from the partnership to *Helme* individually, and also certain debts due to *John Williams & Company*, of which firm *Helme* was a large creditor, which had been assigned to *Helme* to pay his debt, were set apart as a fund in aid of the property of *Helme* and the Plaintiff, to meet demands which the Banks had against the partnership. The sequestration of this property was a guarantee for the benefit of the Plaintiff, to secure him from paying more than his share of the copartnership debts. Had the Plaintiff paid more than his share of those debts, he might have been admitted, provided his admission did not interfere with the rights of third persons, to claim indemnity from that fund. (*Aldrich* v. *Ccoper*. 8 *Ves*. 391.) The Plaintiff has paid of the copartnership debts only his proportion, and has no cause of complaint on that score. He asks however, to go a step further, beyond any that has hitherto been allowed, and demands not to have the benefit of a fund bound to pay the debt of his principal, to which his creditor had a right to resort in the first instance, but to be subrogated to the rights of another creditor, and have recourse to a fund out of which this last creditor had a right to receive satisfaction, because his, the Plaintiff's creditor, might have obtained, on a proper case; such a substitution.

The principle on which sureties are subrogated is, that the fund sought has been actually pledged for the payment of the identical debt which the surety has paid, and that it is malevolent in the creditor, to throw away that fund to his injury. If this principle of substitution is extended further than it has heretofore been carried, the Court will be involved in complicated and perplexed enquiries, to which judicial tribunals are utterly incompetent. The surety asks to be substituted in the place of a creditor against one not his principal, because his creditor might have claimed to be so substituted. It will be but another step, to be substituted to the rights which his creditor's creditor might have claimed.

All cases of substitution go upon the ground that the debt paid, had both a legal and equitable claim upon the fund out of which satisfaction is sought, thus where legatees or simple contract creditors come against the heir, where the personal estate has been exhausted in payment of debts which bound him—the count gives the benefit of the fund to those who have paid the charge, which the law peculiarly laid upon that fund, and the decree carries into effect what was the result of the law, upon the transaction between the creditor and original debtor.

This fund never was liable to pay the debt which the surety has paid. The Complainant's creditor never had any demand or recourse against it, either in law or equity, as it consists of debts which were choses in action, and not liable to execution. It could not be reached even by a bill in equity, as a creditor, excepting in a case of collusion, cannot file a bill against his debtor, and his debtor's debtor. The probable reason being the difficulty of examining first the demand of the Plaintiff, and then the accounts between he Defendants. (*Elmslie* v. *McAulay*, 3 *Bro. Ch.* 624.)

II. The Plaintiff claims, because he alleges that his creditor had a right to be subrogated to the claim, which the copartnership creditors had against this fund. But the principle of substitution is that, where there are two creditors of the same debtor, the one having n demand against one estate only of the debtor, and the other against two estates of the debtor, the former has a right to confine the latter, to make good his claim against that estate which is not liable to the former, or if disappointed, may ask to succeed to the claim of the second creditor against the estate subject to him only. (*Lanoy* v. *Duchess of Athol*, 2 *Atk.* 444—*Attorney-General* v. *Tyndall*, *Ambler* 614—*Ex parte Kendall*, 17 *Ves.* 520.) But in this case the creditors are the same, and the debtors are not the same persons, but different. The equity of substitution lies between other creditors of the copartnership, and the judgment creditors for whom this fund was provided. There is no instance, no decision, and even no *dictum* to support this claim, when the debtors are different. (*Dorr* v. *Shaw*, 4 *Johns. Ch. Rep.* 17.) To ascertain this equity, enquiries of various kinds are to be resorted to, many equities investigated, which the form of the present bill will not admit of.

III. It appears upon the bill that the payment made by the Plaintiff, was after the assignment to the Defendants. The equity of the Plaintiff is neither prior, nor better than that of the Defendants. It is the payment to the creditor, that constitutes the surety the equitable assignee of the creditor, and therefore subrogates him to the rights of the latter. It is not the engagement which gives him the right, but the fact that he has become a creditor, by actual paymen's. (*Per Kent Chancellor in Campbell* v. *Macomb*, 4 *John. Ch. Rep.* 538.)

If the sequestered debts be a fund which this Court can make liable, the Plaintiff is not entitled to relief against those who are purchasers before his equity accrued.—The maxim *qui prior est tempore, potier est jure* being the rule.

The payment by a surety makes him only *quasi* assignee of the fund, but before his payment, it was assigned to the Defendants; *Helme* was its owner, and had every dominion over it, except where the decree restricted him, and it restricted him only as to the partnership creditors. His assignment is, of course, good against all who then had no lien upon it.

IV. The Plaintiff ought first to have established his claim against *Helme* at law, by a judgment. The demurrer admits, that the Plaintiff has paid part of the debt as surety; but this alone does not make him a creditor. It may be that *Helme* has larger claims against him—for this reason, Equity only lends its aid to judgment creditors, otherwise the examination of legal claims is drawn from thei proper forum. (*Rambaut* v. *Mayfield*, 1 *Hawks* 85. *Hendrick's* v. *Robinson*, 2 *John. Ch. Rep.* 283.—*Brinkerhoff* v. *Brown*, 4 *do.* 671.)

Devereaux, for the Plaintiff.—It being admitted, on the other side, that the surety has a right to be subrogated to all the rights of his principal creditor, it only remains to ascertain what rights existed in the State Bank, as to the debt for which the Plaintiff was surety. From the facts of the case, it seems, that before the decree of sequestration was entered, the principal creditor had two judgments against *Helme*; one in which the Plaintiff's intestate was a co-obliger, and one in which he was a mere surety. For satisfaction of these two debts, the creditor could, as to *Helme*, and for the purposes of this discussion, look only to the visible property of *Helme*, which was then under execution. By the order of sequestration, an additional security was created as to the first mentioned debt, and which, in the language of the Counsel on the other side, guaranteed the Plaintiff, from the payment of more than his proportion of that debt. It is obvious, notwithstanding the ingenuity with which the facts are stated, from the very statement of the case, that there were two funds, and two debts, both of which funds could be subjected to the satisfaction of one debt, and only one to that of the other. The question then arises, what equity existed as to the second debt; for it is admitted that we have a right to all that equity.

It is conceded by the argument on the other side, that as a general rule, in the case stated, the creditor who has recourse only to one fund, may either compel him having two, to resort to that which is not subjected to the debt of the former, or that he may be substituted in the place of the latter, as to that fund to which he has no recourse. This being the clear and conceded law of this Court, it is difficult to conceive what reason can be assigned, why the Plaintiff has no equity of this kind. The fact, that both debts are primarily due to the same person, can make no difference; for in this Court, the surety is the person owing the second. Neither can the fact, that the surety in the second debt, is a co-obligor in the first, affect his rights as surety; for as to the two debts, his situation, and of course his right, is essentially different. As to his proportion of the first, he is bound, at all events; but as to the last, he is, saving his liability for it, which cannot affect him as to his present claim, entirely a disinterested person.

But it is said, that the principle on which the surety is substituted, is, that the fund sought has been actually pledged for the payment of the identical debt which the surety has paid, and that it is malevolent in the creditor to throw away that fund. Now, premising that a surety has no greater privileges than a creditor—that is, that his *liability* gives him no greater privileges than actual payment gives another—we contend that this is not the case—that no lien, legal or equitable, is necessary to entitle any creditor to this right. Witness the case of a freehold and copyhold estate mortgaged to A. and the freehold only to B. Copyholds are not subject to the payment of debts, and yet it is the clear law of this

Court, to marshal the estates, so as to give B, the freehold unincumbered. Suppose still further, that the freehold estate is sufficient to satisfy both the mortgages, and that the personal property has been exhausted in the payment of specialty debts. The Court will give to the simple contract creditors, the right the specialty creditors had, of marshalling the debts upon the copyhold, although it is clear, that the specialty creditors had no lien, legal or equitable, on the copyhold. Witness also the case of the legacy not charged upon land, but the assets being exhausted in payment of bond debts, is let in *pro tanto*, upon the land. (*Aldrich* v. *Cooper*, 8 *Ves.* 382.) The principle upon which the Court acts, is entirely free from any idea of a lien, but results solely upon principles of natural equity, which forbid that the rights of one creditor, should be sacrificed to the whim or caprice of another. What but whim or caprice, or a sense of their own convenience, could induce the Banks, in this case, to follow the visible property of *Helme?* That they had a right to an election, is conceded, but we claim the benefit of that election. We claim what they refuse. But independent of these reasons, which are not waived—by the terms of the order of sequestration, the fund now sought to be subjected, was pledged to the satisfaction of the copartnership debts. The money arising from it, is directed to be paid to the Clerk, and that "it shall by him, be immediately paid to the satisfaction of the said executions." An express assignment of them, as collateral security could not make the fund more applicable to the debt—could not give the creditor a better right to say, "we will take the fund *pro tanto*, in satisfaction of our execution." To prove this, let us suppose that the Banks held a third debt against *Helme*, with the security for which they were dissatisfied—that they took the fund, and attempted to apply it to the payment of the third debt. Can it be contended that they could do so? Yet who could restrain them? *Helme* could not; for he cannot complain that his own property goes to pay his own debts. The Plaintiff's intestate could not, in regard to the first debt, for which he was a co-obligor, for he pays nothing but his due proportion of it. Nobody is left then to complain of this wrong, except the Plaintiff, or some creditor situated precisely as he is. (*Ex parte, Rushforth*, 10 *Ves.* 412. *Paley* v. *Field*, 12 *do.* 435.)

I repeat, that it is difficult to show any reason, why the decree of sequestration created no equity as to the second debt. If it had been used in payment of the first debt, it would have left the property liable to execution, free to the second debt. The Banks had a right so to use it, and we only seek to be put in the situation, in which we should have stood, if it had been so used. But it is said, that the fund now sought to be subjected, never was liable to pay the debt which the surety has paid—that the Plaintiffs' creditors, viz. the Banks, never had any recourse against it, as it consisted of debts, which are not the subject of an execution, and that it cannot be reached even by a bill in Equity, as a bill cannot be filed against a debtor's debtor; for which is cited *Elmslie* v. *McAulay* (3 *Bro. Ch.* 624.) To the first, we reply, that the very terms of the order of sequestration, give our creditor the right to the fund, and that we have a right to be substituted to him. It is, being the property of *Helme*, liable to pay all his debts, and it has been shown, that no specific lien is necessary to enable us to resort to it. It is true, that it is not such property as is liable to an execution; but it never was before contended, that this characteristic was necessary to enable a Court to marshal—on the contrary, if it was so liable, there would be a complete remedy at law. As to the proposition, that a bill cannot be filed against a debtor's debtor, it is denied—and the case cited, will be found not to support it.

Again, it is said, that in all cases of substitution, there must be different creditors of the same debtor; but that this case is that of the same creditor of the two debtors. This objection has its origin in an incorrect view of the subject. By the established rules of the Court, the Plaintiff was a creditor in respect of his liability, so there are two creditors—in Equity, and looking at the substance of the transaction, *Helme* was the real debtor, *quoad* his half of the debt due the Banks, and not the copartnership. The cases *Ex parte Kendall*, and *Dorr* v. *Shaw*, fully prove, what is conceded—that if there is no equity to affect the fund sought to be subjected, it shall not be so subjected.

Again, it is said, that if applications of this kind are allowed, the accounts will be so complex, as to render it a matter of policy to decline sustaining such bills. I submit, that it is one of the peculiar features of a Court of Equity to give relief, when at law, the complexity of accounts render relief impossible ; and I think, that I am supported by the following cases, most of them connected with the subject now under consideration, and which prove that no accounts, which can be sólved by human calculations, are considered as too difficult for the Master to act on. (*Ex parte Marshall*, 1 *Atk.* 129—*Ex parte Wildman*, *Do.* 109—*Ex parte Turner*, 3 *Ves. jun.* 343.)

But it is argued, that if the Plaintiff ever had any equity, it has been defeated by the assignment to the Defendants—that the Plaintiff had no equity until the money was paid, and that, not being paid until after the assignment to the Defendants, the equity of the latter is better. As to the first it is submitted that if any equity ever existed in the Plaintiff it cannot be defeated by matter *ex post facto* between *Helme*, and the Defendants, especially as the bill charges and the demurrer admits the defendant had notice, the maxim being *qui prior est tempore, potior est jure.*

But we contend that the equity of a surety arises from his liability, that in respect to this he is considered as a creditor—all the cases go upon this principle—for this reason he can compel the principal creditor to prove, under a commission of bankruptcy, and hold the dividends for his benefit before he has paid any thing—for this reason, after a default by the principal debtor, he can, upon indemnifying the creditor, urge him to diligence in getting security, and many other cases might be cited which go upon this principle. The *dictum* cited as from Chancellor *Kent* in *Campbell* v. *McComb*, does not support the position, and if it did is entirely opposed to his express decisions in *Hays* v. *Ward*, (4 *John. Ch. Rep.* 123)—*King* v. *Baldwin*, (2 *Ditto* 554)—*Cheeseborough* v. *Millard*, (1 *Do.* 409)—*Stevens* v. *Cooper*, (1 *Do.* 425.)

But it is said again, that we have no right to come into equity, until we have established our claim at law. This is unquestionably true as to mere legal demands; but the rule is different when the demand sought to be recovered is one which a Court of Equity is in the habit of ascertaining, and which may as well be done here as at law. (*Lawson* v. *White*, 1 *Cox* 276—*Dering* v. *Earl of Winchelsea*, *Ditto* 318.)

Henderson, Judge.—This certainly was once a case proper for a subrogation; two creditors—two funds—both funds accessible to the preferable creditor, and one only accessible to the other. And had an application been made at any time during this state of things, I think that there cannot be a doubt, but that the creditor disappointed of his only fund, by the creditor who had the choice of two, might take the rejected fund as his means of satisfaction, in lieu of the one thus taken from him; upon a principle of natural equity, that he who in the exercise of his own just rights, injures another, is bound to make satisfaction, if he can do it without loss to himself. But the application should have been made during the time that the power of the Bank over the fund created by the decree, existed, as all that the Plaintiff can ask for is, to be subrogated to rights which they had when the bill was filed. No principle of equity recognised in this Court was violated by the Bank, in resorting to the fund most convenient in their estimation, for the satisfaction of their debt, and on this point, they were the sole judges. It is sufficient if the object was to secure themselves, and not to injure another. This case is also somewhat weakened from the circumstance that the property was not withdrawn from the operation of the Plaintiff's execution by means of the sequestration; but was, from its nature, never subject to it, being debts and choses in action. There was nothing, therefore, personal in the equity which the Plaintiff had; it consisted simply in this, to have from the Bank an assignment of this sequestered fund, upon its being ascertained that the Bank did not want it. But the Bank lost all its power over the fund when their debt was satisfied, and *Helme* was then remitted to his original rights, and most certainly, I think, had full power to transfer it to any one, *bona fide*. This, it seems, he has done to the Defendants *Washington* and *Thompson*. If it is argued that the Bank could not know whether they would want the fund, until it was ascertained whether the other property of *Helme* would pay their debt, and therefore such application to them would be premature, it is answered that they might be required to make a provisional assignment. As to the equity against the Defendants *Washington* and *Thompson*, the Plaintiff has none; they are purchasers or incumbrances for value and in that respect equal at least in equity to a creditor, and have by the transfer acquired a specific equity to hold the property. As to the ground of subrogation on the score of the Plaintiff's having paid the debt to the Bank as the surety of *Helme*, he can, on that ground, only obtain the securities and facilities which the Bank had, in securing and collecting the debt thus paid by the surety, and not those which the Bank had against the debtor or any other person, or fund for securing and paying another debt.

Hall, Judge.—I am at a loss to perceive the equity that entitles the Plaintiff to a priority in interest, over *Washington* and *Thompson*. His intestate was surety for *Robert H. Helme*, for a debt upon which there was a judgment and execution against him, but there was no lien created thereby on the fund in question, neither had the creditor a lien on that fund. If they had, and could thereby have had their debts discharged, but had elected to proceed against *Helme's* property, which only was liable for the Plaintiff's debt, and which would have been applied to the Plaintiff's debt, had not the execution of the Bank been the oldest, I think in that case the Plaintiff might claim to stand in the place of the Bank, as to that fund. But it does not appear that the Bank creditors had any option. Neither they, nor the Plaintiff's intestate had any lien upon it. And if *Washington* and *Thompson* are *bona fide* creditors of *Helme*, and have got a conveyance of it in discharge of their debt, I see no reason why it should be wrested from them. For aught that appears, their claim is as well founded as that of the plaintiff.

Per Curiam.—Let the demurrer be sustained and the bill dismissed.

Isaac Williams, Adm'r. of John Williams,
v.
Robert H. Helme, John Washington, and David Thompson.
From Johnston.

A surety has in respect of his liability, the rights of a creditor, and upon the insolvency of the principal debtor may retain any funds belonging to him in his hands.

Therefore, where the surety owed the principal debtor, who became insolvent, and assigned for value the debt due by the surety, it was held that the latter might retain the amount of his subsequent payment against the assignee.

The Plaintiff in his bill alleged, that before the 27th of May, 1826, his intestate was bound as surety for the Defendant *Helme*, to a large amount, and was also indebted to him on that day, in the sum of $1491, 33, for which suit had been brought by *Helme*, returnable to the County Court, which sat on the said 27th of May, 1826. That *Helme* was very anxious to collect the amount due on the debt of $1491, 33, and the Plaintiff to prevent him, as he wished to retain that sum, as an indemnity against the suretyship of his intestate for *Helme*—that it was agreed between them that the Plaintiff should confess a judgment for the debt, with a stay of execution for three months, which was accordingly done—that on the 27th of May above mentioned, after the confession of the judgment by the Plaintiff *Helme*, whose circumstances had been doubtful, failed, and proclaimed his insolvency—that between that time and the ensuing August Term of the County Court, executions issued against him, and the Plaintiff on a judgment which had before that time been entered up against them, whereon the Plaintiff had paid the sum of $4877, 87, for which his intestate was bound, as surety for *Helme*.

The bill then charged that *Helme*, instead of satisfying the judgment for $1491, 33, which the Plaintiff had confessed, by applying the amount of it, to the sum thus paid as his surety, had assigned the judgment to the Defendants *Washington* and *Thompson*, who were copartners, in payment of a debt due them, and that they, in the name of *Helme*, had issued an execution thereon, and were about to raise its amount, from the assets in the hands of the Plaintiff.

The prayer of the bill was for an injunction and a discovery.

All the Defendants answered, and proofs were taken, but the case made by the bill, was not materially varied. It appeared from the answer of the Defendants *Washington* and *Thompson*, that the assignment was made by *Helme* to them, on the 2d of June, 1826, which was before the payment of the $4877, 87, by the Plaintiff.

Badger and *Devereaux* were to have argued for the Plaintiff, but the Court called on the Counsel on the other side.

Seawell and *Gaston*, for the Defendants, *Washington* and *Thompson*, argued strenuously, that it was a mistake, to believe that sureties are entitled to any peculiar favor in a Court of Equity. They, having received no equivalent for their undertaking, are bound, or not, by the rules of law, and cannot be made liable to any greater extent, or in any other respect, than was contemplated by them when they entered into their engagements; but the extent they *did intend*, Equity, in case of a mistake or accident, will afford the same assistance against them, that it would against him who had received a valuable consideration. A lost bond, for instance, will be set up against the surety; and, in short, he will be compelled to do everything he undertook to do. The surety, then, can, by no possibility, be said to have a higher equity than a creditor. Suppose, in this case, the intestate, *Williams*, had been a creditor of *Helme*, but that the debt was payable at a date subsequent to the assignment to *Washington* and *Thompson*, and that, instead of a *judgment*, the assignment had been of a *note*, with notice to the assignees, of the insolvency of *Helme*, and that he was in fact debtor to the intestate. Could equity interfere in such a case? If it be answered, that, in the case stated, the legal title passed to the assignee, which did not by the assignment, of the judgment, it can be replied that if the assignee of the legal title *had notice* of the prior equity, he is regarded as precisely in the situation of the assignor. The matter of equity charged in this bill, would furnish no defence at law in the case stated, I think, cannot be controverted; and if not, I ask why? The action at law is assumpsit, where every equitable defence is let in—the action is but a substitute for a bill in Equity, in which the Plaintiff can never recover against conscience; and if it be admitted, that the grounds of this bill would form no defence at law, the consequence must be, its dismissal. In reference to the case supposed, how does this case stand? *Helme* is indebted, and the intestate is his surety. There is a judgment obtained against both. The intestate is indebted to *Helme*, by judgment against his administrator. *Helme*, the principal, is indebted to the Defendants, and assigns to them this judgment, in satisfaction of the debt—it is charged in the bill, that at this time his insolvency was not only known to himself, but was a fact of general notoriety. If, instead of taking the judgment, and assigning *that*, the assignment had been of note, the Defendant would have been protected by law and equity both. Not that he has a better conscience, or is fenced with a stronger wall—for his action at law is subject to precisely the same defence, but it is simply because the administrator could offer no objection to his action, but a *possibility* of his intestate's sufferings, in virtue of his suretyship. Now it is important, not to confound the relief which a Court of Equity furnishes, as growing out of justice and equity of the *actual state* of the case, and that interference which it extends to prevent an injury that may *possibly happen*. The first is founded upon the justice which then exists; the latter arises entirely from the *fears of what may happen.* When the assignment was made, the surety had paid nothing, and tho' *Helme* was in fact, insolvent, it was equally known to the Plaintiff, and he ought, instead of confessing judgment, to have insisted upon retaining the debt, as an indemnity, and in case of refusal, enjoined its collection. Yet he voluntarily confesses judgment, and is satisfied with a stay of execution. The Defendants, at this time, are actual *creditors*, not depending upon any contingency; they have *already advanced* their money, and receive in payment this judgment. Why should not their debt stand upon as high ground, as the responsibility of a *surety*, who *might*, or might not, be compelled to make advances? If the transfer, or collection of this judgment, had been enjoined, it is admitted, that the Defendants would not be permitted to derive any benefit by a conveyance subsequent to such injunction—not upon the ground of superior equity, but because it would have been in contempt of the order of the Court. By the assignment, they acquire a title in Equity to the money, which is older than that which the Plaintiff has; for his title to the *money* never existed, till the payment as surety.

Again, a *debt* is regarded as property, as much as any chattel: it is capable of being transferred, and can pass from hand to hand. If it is evidenced by negotiable paper, the legal title will pass to the assignee, who may sue in his own name; but in Equity, every debt will pass, upon satisfactory evidence of a disposition, whether it be negotiable at law or not, and whether with, or without consideration; and for the very same reason that a chattel in possession would have passed. The judgment then, was to be regarded as so much property *belonging* to *Helme*, and to place it on the strongest grounds for the plaintiff, in the possession of the latter, and which could be disposed of by *Helme*, precisely as any other chattel. Suppose, instead of this debt, it had been a horse, is there any thing which could have hindered *Helme* from transferring it, in satisfaction of *Washington* and *Thompson's* debt ? Could *Williams*, the administrator, in Equity have resisted the delivery upon the ground of his liability as a surety, and the insolvency of *Helme ?* It is true, that the *result* shows, that *Helme's* estate when afterwards sold by the Sheriff, did not raise money enough to pay all his debts, and that, by *this consequence*, *Williams* was obliged to pay the amount of his suretyship ; but it cannot be said, that at *that* time, *Helme owed Williams* any thing. If he did not, *Helme* had nothing in *his* possession belonging to *Williams*, which I consider as essential, to entitle *Williams* to *retain* what had belonged to *Helme*. For the ground upon which *Williams* must resist payment to *Washington* and *Thompson*, is, that he has a right to retain it, in the nature of a set-off; for unless he can do this, he has no title at all. To examine a little further what has been already stated. It must be confessed, that there is no peculiar right which the Plaintiff had to retain this debt, that would not have applied with the same force to any other estate belonging to *Helme*, which might have been in his possession. Suppose that instead of the debt, it had been a horse, and *Helme* had sold the horse to the Defendants in part payment of their debt, could there have been any defence against the title ? But if it should be said, the legal title passed, which would protect the purchaser without notice—then suppose the Defendants to have notice, and how would that affect the case ? To entitle the Plaintiff to retain, it is necessary for him to show a title to the *thing retained*. This is the clear rule in regard to a chattel. If the thing retained be money, as a debt, then there must be a claim against the creditor for *money* ; and as there is no difference between monies of the same amount, that entitles the debtor to retain it, instead of its being paid by the creditor. But examine it, in whatever light, either subtlety or ingenuity can, this right must be bottomed upon a *title to the thing retained.* Now in the case of factors, their lien depends upon the nature of their employment, and the implied understanding of the parties, by the rules of law, and is founded exclusively, upon commercial considerations. Without such a rule, no man would, or could become a factor, without the greatest peril.

But if it be said, that in a case of *actual insolvency*, the *liability* of the surety, against whom there is a judgment, affords him the right to withhold payment, I answer, it is true, that the Court of Equity, whose province it is to prevent mischief, will afford its assistance—but how far ? To enjoin *perpetually*, before the surety was paid ? Or, will it not rather say, that he shall not reduce this debt to his possession, until he has released the surety from his thraldom ? That interference of the Court does not spring from any right which the surety has to the *money*, but from the right which he has to be *protected*, against mischief that *may* befal him. The conduct of the Court is with the view of *preventing* the principal from committing a dishonest act ; for it would be the height of dishonesty in a principal to collect a debt from him, and at the same time, leave him to pay as surety. This rule, it is true, exists, but only between *principal* and *surety.* The rule upon which the Court goes, is to prevent a dishonest act ; but where is the dishonesty in paying one creditor, when the effect *may* be, that another is to go unpaid ? Are not all creditors equally meritorious ? And will a Court of Equity, when an application is made to enforce payment of a debt, not recoverable at law, say to the creditor, that all other creditors must be let in *pari passu,* and yet, if relief be given in this case, it must say further, indemnity shall be retained for him, who in *probability may* be a creditor ? It is true, that where a fund is provided for the payment of *debts,* and it is necessary to resort to a Court of Equity to have the trust executed, there all creditors come in; but for a very different reason—that is, because the fund was *provided* for *all* the debts. The Defendants are *bona fide* creditors of *Helme*, and have his assignment of this judgment, in part satisfaction of their debt, and they have the same equity to retain it, that they would have, had they received so much money with notice of the Plaintiff's liability.

The assignment was perfectly honest as respects the Defendants, and they are entitled not only to the forbearance of the Court, but to its assistance, if necessary to the full enjoyment of it. The Plaintiff has applied to the Court, to obtain its assistance in prejudice of their right. It is distinctly admitted, that having only obtained the equitable title from *Helme*, the Defendants can have none other, than he *then* could convey, and that any equity which the admininistrator *then* had as a lien on the debt which was assigned to them, if it was prior in point of time, must prevail, as the better title; but it is conceived that his responsibility gave him no title when he had paid nothing, against an actual existing creditor. Suppose the way of further illustrating this point, *Williams* the surety had been sued by the executor of *Helme*, could he have been entitled to the relief of this Court upon this bill, yet the Court must go the length of saying he would, if he is to be relieved in this case. This is indeed a stronger case against relief, for here there is a specific assignment of this debt to a particular creditor. In the case supposed, the debt from the surety, would, by operation of law become assigned to the executor for the benefit of all the creditors; the death of *Helme*, could not give his creditors higher claims upon his assests, than he could by his own act during life, and we think it must be perfectly clear, that if a bill was filed against the executor upon the grounds made in this bill, the Court must say, "that its equity was imperfect, there was no equity *attached to the debt*, because there was nothing *paid* by the surety, that the assets were to be distributed amongst those who are creditors."

To examine this case upon first principles, it seems to me there cannot be a doubt—here is a dispute between two men respecting a piece of property, it being a debt due from *Williams* to *Helme*, and sold by him to the Defendants, does not at all make it different from any other property. The purchaser is content to take the title he obtained, and is not applying to this Court for its assistance—*Williams* sets up an opposite claim, and calls upon this Court to hinder the Defendants from their using means—the Defendants have paid their money, *Williams* at the time they bought, had never paid one cent, nor contracted to do so. His claim which he asserts to be superior to the Defendants, is not founded upon any contract express or implied, or any lien which the law, for purposes of policy, has afforded ; nor is it sustained by any want of morality in the purchase of the Defendants ; but he rests it upon the fact that he was surety for *Helme*, and that at the time *Helme* assigned the judgment, he was insolvent, whereby it was probable he would become a creditor, by being obliged to pay the debt of his principal—now unless it can be shown that a surety *de facto* acquires a lien upon the property in his possession belonging to his principal, or that a surety has a superior equity to a creditor, it seems to me impossible to sustain this bill.

If *Williams* really did suspect the solvency of *Helme* at the time of giving the judgment, as he says was the case, then I ask, who is to be blamed for what has happened ; the remedy for them was a plain one, his intestate had become *Helme's* surety for a debt, and by paying that debt immediately, he would then have had an equity to retain it—he thereby would have obtained a *title* in equity to it ; why did he not pay it ? Did not his intestate promise to do so, and shall it be said that it would have been hard to force him to raise the money by a sale of his intestate's estate, before *Helme's* proper-was exhausted? But if *Helme* was then insolvent, or what is the same as to *Williams's* duty, if he thought he was, it become then absolutely necessary for *Williams* to pay the debt, or take a defeasance against the judgment. If the loss, therefore, fell upon the estate of the surety, it is through the negligence of the Administrator, and the rule seems well established, that those who occasion the loss ought to bear it.

Henderson, Judge.—The equity of the Plaintiff arises from the insolvency of *Helme*. The right of the latter to assign the judgment was lost when he became unable to exonerate the Plaintiff from the thraldom in which he was placed on account of the suretyship—when *Helme* became unable to reciprocate the act which he required *Williams* to perform. I do not know a plainer equity; indeed it was admitted in the argument, that if *Williams* had, before the assignment, actually suffered, he would be entitled to the relief which he asks. Or if he had, before the assignment, applied to this Court to restrain *Helme* from transferring, that then the assignment would not avail, as it would have been made in violation of an order of the Court. *Williams* has other equities besides those arising from actual sufferings. As a surety, he has a right to have his fears and apprehensions quieted, to be made safe from apprehended harm. He need not wait till he has suffered, because his equity arises before that time; and this seems to be admitted in that part of the argument, which rather concedes, that he might have obtained an order that *Helme* should not assign. And as to the position, that *Williams* should have applied to a Court of Equity to restrain *Helme* from transferring, I think that his equity is higher than any which could arise from the violation of orders or rules of Court. It is independent of them—it arises from the principle first mentioned, that *Helme* could neither, by himself, nor by another, require of *Williams* to do, what he (*Helme*) was unable to do towards him, from the fact of his insolvency. *Williams* being indebted to him, was also bound for him in a very large sum, from which he sustained a loss of double the amount of the sum which *Williams* owed. The debt which the Plaintiff owed, should have been left in his hands, as an indemnity in part for his loss. It is true, that if the judgment had been of a negotiable character, it would have been proper to have applied to a Court to restrain its negotiation; for had it been of that character, *Williams* might have had a legal owner to contend with, one who stood upon his own right, instead of those of another—and who would not, as these Defendants, represent the original creditor, and be bound by every obligation which was imposed upon him.

The Defendants say, it might possibly be different, if they were suitors to the Court; but they are not, they ask nothing of this Court. In this they are mistaken; they are applicants for a favor, in the character of Defendants. The law gives them nothing; their rights are not known at law. They would not be even heard to allege them—there, *Helme* is still the owner of the judgment. Here, the Defendants are made parties by mere courtesy. The Plaintiff might have left them to come into this Court as petitioners, asking to be permitted to use the name of *Helme*. They owe their existence as claimants to the principles of this Court, and they ask to do, in the name of their assignor, what it would be the height of iniquity to permit him to do, because they say, that the latter sold to them—but *Helme* had nothing that he could sell. I think, therefore, that the injunction should be perpetuated. I have viewed the case, as if *Helme* intended no actual fraud, when he assigned to the Defendants. He says so, and there is nothing to induce a belief that he did. But the *fact* is, that he was then insolvent, and therefore could pass nothing in the judgment, as against the Plaintiff.

Taylor, Chief-Justice.—I am of opinion that the prayer of this bill could not be rejected, without violating very clear principles of natural justice, and subverting that series of decisions, by which this Court has been constantly guided, for the protection of sureties. It is not controverted, that the estate of the Plaintiff's intestate, who was surety for *Helme*, became liable to pay a considerable sum for him, a very short time after the confession of judgment, and that this money was subsequently paid out of the estate. It is very evident, that if *Helme* had determined to enforce the judgment upon the expiration of the stay, he would have been enjoined, unless he counter-secured the estate against his own debts. When the debts of *Helme* were paid out of the estate, his debt against it was extinguished, according to such plain principles of justice, that I imagine the law of every civilized nation has adopted them. In the civil law, it was called compensation, and is thus spoken of by a writer on that law: "When it is said that compensation is made *ipso jure*, it means that it is made by the mere operation of law, without being pronounced by the Judge, or opposed by the parties. As soon as a person, who was creditor of another, becomes his debtor of a sum of money, or other matter susceptible of compensation with that of which he was a creditor; and *vice versa*, as soon as a person who was debtor to another, becomes his creditor of a sum susceptible of compensation with that of which he was a debtor, a compensation is made, and the respective debts are from thenceforth extinguished, to the extent of their concurrence, by virtue of the law of compensation." (*Potier on Obligations*, 599.) As the civil law exists in Scotland, the principle is there adopted without variation, and it is held that where the same person is both debtor and creditor to another, the mutual obligations, if they are for equal sums, are extinguished by compensations. (*Erskine's Institutes*, 325.)

Williams had a well ascertained equitable right against *Helme*, before payment of money for him, and might have called upon him in this Court to relieve him from his liability by payment of the debt, and would certainly have been allowed to set off the judgment against it. The case ot *Lee* v. *Rock*, furnishes an instance, where a man borrowed money on the mortgage of his estate for another, of his being allowed to go into equity, to have his estate disencumbered by him, and the covenant in the mortgage-deed was held to bind the Defendant, though no party to it; but the money being borrowed for him, it was his debt, and the surety was only a nominal person. (*Mosely*, 319.) And he may not only come here to be relieved from his liability, but as soon as he becomes liable to the creditor, or is endangered, though he has not paid the debt, he has a right to enforce mortgages, or other counter securities given to indemnify him. (*Antrobus* v. *Davidson*, 3 *Merivalle* 579—*Tankersley* v. *Anderson*, 4 *Dessaus*, 44.)

This was the relation in which *Williams* stood to *Helme*, immediately after the confession of judgment, and when the true state of the latter's affairs were known. This equity was prior then to any which could be acquired by the assignees of the judgment. But there was, in fact, no equity to be acquired by them, for it would be against first principles that the assignor should place the assignee in a better situation than he stood himself. Policy has introduced an exception with respect to bills of exchange, and notes endorsed before they are due, but in all other respects the rule and law of this Court are on that subject universal. (*Coles* v. *Jones*, 2. *Vern.* 692—*Davis* v. *Austen*. 1 *Ves. jun.*, 247.)

As many of our most valuable principles of equity, as well as law, are derived from the civil law, it is not surprising to meet with almost the very case before us, stated in a work of authority on that law, as administered in Scotland. "Though, says the writer, compensation cannot be pleaded after the decree, either against the creditor or his assignee, yet if the original creditor should become bankrupt, the debtor, even after decree, may retain against the assignee, till he give security for satisfying the debtor's claim against the cedent." (*Erskine's Institutes*, 328.)

Per Curiam.—Let the Judgment be made perpetual, with costs.

Robert H. Wynne
v.
Thomas Alston, } From Franklin.

The vendor has a lien for the purchase-money upon the land sold, against volunteers, and purchasers with notice.

It seems, that a creditor who takes a lien for an antecedent debt, is not entitled to the privileges of a purchaser.

The case made by the bill, answer, and the proofs in this cause, was, that the Plaintiff sold a tract of land to one *Jeffreys*, and took his bonds for the purchase-money—that *Jeffreys* never paid these bonds; but conveyed the land to one *Outerbridge*, to secure a prior debt, and that *Outerbridge* conveyed to the Defendant. The Defendant had notice of the non-payment of the purchase-money, and the only question was, whether the Plaintiff had a lien upon the land for its security.

Gaston and *Badger*, at a former term, argued for the Plaintiff.—The Reporter was not in Court when that argument was made, and has no note of it.

At this term, *Seawell*, for the Plaintiff, discussed the question extensively, and cited *Chapman* v. *Tanner*, (1 *Vern.* 267.) *Blackburn* v. *Gregson* (1 *Bro. Ch. Rep.* 424.) *Fawell* v. *Heel*, (*Ambler* 726.) *Nairn* v. *Srowse*, (6 *Ves.* 759.) *Smith* v. *Hibbard*, (*Dickens* 730.) *Charles* v. *Andrews*, (9 *Mod.* 152.) *Macreath* v. *Simmons*, (15 *Ves.* 354.) *Hughs* v. *Kearney*, (1 *Scho.* and *Lef.* 132.) *Garson* v.

Green, (1 *Johns. Ch. Rep.* 308.) *Mills* v. *Grant*, (2 *Ves.* and *Bea.* 309.) *Ex parte Peake*, (1 *Mad. Rep.* 346.)

Hall, Judge.—It has been a long-established principle in the English Courts of Equity, that the vendor of land sold, has a lien upon the land for the purchase-money in the hands of the vendee, or in those of any person claiming under him, with notice, although for a valuable consideration. (*Sug. Vend.* 386, and the authorities there cited.)

I am not aware that the question has been stirred in our Courts, before the present suit. It is therefore necessary to consider how far, on the ground of expedience and fitness, the doctrine should be introduced into our system of equitable jurisprudence.

When land is sold by the vendor for a certain price, to be paid by the vendee, in point of justice and equity, the vendee does not become the owner of the land, until he has paid the price. Until the payment, the title of the vendor should not, in this Court, be divested. At law, when a legal title has been conveyed upon a nominal consideration, but the real one is unpaid, the vendor is concluded, and estopped from claiming the land; but in Courts of Equity, where real facts appear, and truth is not disguised, although the vendor cannot claim the land, it is but just and equitable that he should have a lien upon it, for the money for which it was sold. The equity of the rule is not altered, when it is applied to a purchaser from the vendee, although for full value, if he is affected with notice; because, having notice, he knows he is purchasing that which in justice and equity, his vendor had no right to sell. But, without such knowledge, as he has the legal estate, a Court of Equity will not interfere.

I think the equity here insisted upon, is an universal equity, applicable to all societies, that profess to be governed by principles of justice, let the form of their government be what it may. Nor do I think it is varied by the circumstance, that in England, lands cannot be sold under a *fi. fa.* but are only subject to the *elegit*. This case is not one of a contest between the vendor and a creditor of the vendee, where the vendor having a legal title and possession, might have been trusted on that account. But it is that of a purchaser from the vendee with notice, who, at the time of the purchase, paid nothing for it, but who took it as an additional security for a prior debt.

This equity is not founded on any rule of policy which gives a preference to one creditor over another, but upon principles of natural justice, which prescribe, that when a person sells an estate in lands, he is not considered as parting with it, until the stipulated price is paid, or until surety is given for the payment of it in some other way

It is said, that landed and personal estate are equally the subjects of traffic in this country, and that the lien in question is equally applicable to both; or, in other words, applicable to neither. It may be observed, that titles to personal estate, in times past, have been evidenced by possession, and passed from one person to another, with more facility than titles to real estate, which are always of record; and that equities connected with the latter, as in the present case, can only be enforced against those who were conusant of them. The science of law is however progressive; whether it will ever fix a lien upon personal estate, on behalf of the vendor in the hands of the purchaser, to the amount of the purchase-money, is not for me to predict. But with respect to real estate in England, from whence we have derived our notions of jurisprudence, I may be permitted to say *sic est lex;* and that the principle is worthy of adoption in this country.

HENDERSON, Judge, concurred in opinion with Judge HALL.

Taylor, Chief-Justice, *dissentiente.*—This case presents, for the first time, the naked question, whether a vendor, making a deed and delivering possession to the vendee, retains a lien on the land for the purchase-money. It may now be considered as the established law of a Court of Equity, in England, that when the vendor conveys his estate to the vendee, without receiving all, or any part of the purchase-money, he has, as against the vendee and his heir, and all claiming as volunteers, or purchasers for a valuable consideration with notice, a lien upon the estate for the whole, or such part of the purchase-money, as was not paid; and this, although the consideration is, on the face of the instrument, expressed to be paid, and a receipt endorsed. Upon this general rule, there is a concurrence among the authorities, though upon many points arising from the complicated system of Equity, which has been built upon it, there is a considerable diversity of opinion among the most eminent Judges; as, for example, what kind of security received in payment amounts to a waiver of the lien. *Nairn* v. *Prowse*, (6 *Vesey* 752.) *Macreath* v. *Simmons*, (15 *Vesey* 341).

It is not easy to ascertain at what period the doctrine was incorporated into the law; but the first reported case to be found in the books, can scarcely be called ancient. It is certain, that the refinement and intricate deductions from the rule, have arisen since our revolution. The existence of the lien, as a general question, was argued so lately, and though the Chancellor gave a strong opinion in favor of it, yet he would not decide it, in consequence of one of his predecessors having given an opinion that the vendors taking a bond, discharged the lien. *Blackburn* v. *Gregson*, (*Bro Ch Rep.* 420.) It was again declared in 1802, whether a vendor, who had taken the bond or note of the vendee for the purchase-money, retained his lien on the land. The question arose between a creditor, who claimed under an equitable mortgage, created by the deposit of a deed and the vendor who had taken a deposit of stock, to secure the payment of the purchase-money. The Court determined, that by taking the deposit of stock, he had waived his lien; and the question between the creditor and vendor was not decided. (*Nain* v. *Prowse*). Upon the whole, I think it may be satisfactorily gathered from the Books, that the system was not so firmly established at the period of our revolution, as to require us to consider it as part of the Equity jurisprudence then in force in this State, and to render obligatory upon us, the subsequent adjudications which have arisen upon it.

It is said, there is a natural equity, that the vendor of land should retain a lien for the price of it; and there is some foundation for this equity, where the lands cannot be sold for the debts of the purchaser. But where land is liable to be sold on execution, to the same extent with chattels, where it is the subject of daily transfer and traffic, conveying a fee-simple estate in allodial right, (a thing of rare occurrence in England,) the equity is not stronger as to land, than as to chattels. Nor is it probable, that this doctrine would have been introduced in England, if the tenures there, and the process of execution, had been equally simple with those in this State, It is the policy of our law, and in harmony with our political institutions, that the right of aliening land, should be enjoyed by the owner, with unrestricted freedom; and that any person may safely give him credit, on the faith of an undisputed possession, and of a right, attested and authenticated by the public registry. The facility and security given to creditors, is perhaps more remarkably characteristic of the law of this State, than any other feature it possesses. All conveyances not recorded, and all secret trusts, are made void against them, as well as against subsequent purchasers without notice. But the security held out to creditors, would be hollow and unsound, if these latent trusts were permitted to rise up against them, and defeat a title honestly acquired from the apparent owner. The sound and wholesome doctrine is, if the vendor sells without receiving the price, and cannot trust to the solidity of the vendee, let him create a lien upon the land, by taking a mortgage, and register it within the time now required by law. If it is understood, that a purchaser, after searching the Clerk's office for judgments and executions, and the Register's office for incumbrances, and finding all clear there, must still take the title at the risk of some unrecorded equity—some inscrutable lien, a very serious obstacle will be opposed to the alienation of real estate.

I believe there are but few States in the Union, which have retained the British law as to executions against land. I know of but one, Virginia—though there may be others. There the principle prevails, that the vendor has a lien upon the land for the purchase-money; and where the writ of *fieri facias* cannot reach land, there is a semblance of justice in the adoption of the principle. It also prevails in New York, where the *fieri facias* does reach land; but in some of the states, under the like circumstances, the doctrine is partially, and in others, entirely rejected. In Pennsylvania, the vendor parting with the legal estate, retains no equitable lien for the unpaid purchase-money; but he does retain it, if he parts only with the equitable title. (1 *Yates*, 393.)

The question was brought before the Court of Chancery in South Carolina, so lately as 1808, when it was distinctly adjudged by the Court, consisting of three Chancellors, that a vendor, selling lands and conveying them in fee, and taking a bond for the purchase-money, without taking a mortgage, has no implied lien on the land, so as to give him any preference over the creditors of the purchaser. *Wragg* v. *Comptroller-General*, (2 *Dessaus*. 509.)

For these reasons, I should have been of opinion, that he bill be dismissed; but as the question had not been before brought into discussion, I think it should be without costs. But as my brothers are of a different opinion, there must be a decree for Complainants.

Per Curiam.—Direct an account to be taken of the purchase-money unpaid.

James Martin, Adm'r. of Randolph Maberry,
v.
Lucy Maberry, Abraham Maberry & others,
From Iredell.

A bill of Interpleader can only be filed by one in possession. Therefore, where an Administrator never had reduced the assets into possession, but they were in that of some of the distributees, who claimed adversely to him; a bill by him against the distributees, praying that they might interplead, is improper.

But the Defendant to such bill, who claimed adversely, having answered, filed a cross bill, submitted to an account, &c., he was enjoined from computing the time spent in this litigation, in bar of an action at law to be brought by the Administrator.

The bill alleged, that letters of administration upon the estate of *Randolph Maberry*, issued in May, 1824, to the Plaintiff—that under them he took possession of part of the personal estate of his intestate; but that a number of negroes belonging to the Plaintiff's intestate, were, at his death, in the possession of the Defendant *Abraham*, who claimed them for one year, under a contract of hire from the intestate. That other slaves, of which the intestate died possessed, were detained from the Plaintiff by the Defendant *Lucy*, who was the widow of the intestate, and who claimed the last-mentioned slaves, under the will of a former husband. That the Defendant *Lucy*, and the other Defendants, the children of the intestate by a former marriage, were his distributees. That the children contended, that the negroes of which the Defendant *Lucy* had possessed herself, had by her intermarriage with the intestate, vested in him, and formed a part of his personal estate, and insisted that the Plaintiff should make distribution of them, and also of those in the possession of the Defendant *Abraham*.

The bill then averred, that both the Defendant *Lucy*, and the Defendant *Abraham*, had refused to deliver to the Plaintiff, the negroes of which they were respectively in possession.

The prayer was, that the several Defendants might interplead, and have their rights adjusted, so that the Plaintiff might be indemnified in making distribution.

From the transcript of the record of the Court below, it appeared that the bill was filed in 1824; soon after the Defendant *Lucy* filed a cross bill. The Defendants answered.—Proofs were taken, an account directed, a report made, the causes set for hearing, and removed to this Court.

At the last term, *Badger*, for the Defendant *Lucy Maberry*, moved to dismiss the bill. He argued, that in no case, could a bill of interpleader be sustained, where the Plaintiff was not in possession; and insisted that this bill was without a precedent. The title of the Plaintiff, if he had any, was purely legal, and he comes into this Court, being out of possession, and asks that the person who claims a legal title, adverse to his, may interplead with one whose title is purely equitable, and for whom he (the Plaintiff) is a trustee.

Wilson, for the Plaintiff, insisted strenuously, that this was a proper case for a bill of interpleader; that the Plaintiff was a trustee, and had a right, not only to be protected from an expensive litigation, but to ask the advice of the Court. He argued, that it was against first principles, to permit a Defendant, after submitting to answer, and after taking proofs, and going on to the hearing, to move for a dismission. For this he cited, the opinion of KENT, Chancellor, in *Underhill* v. *Van*

Courtlandt, (2 *Johns. Ch. Rep.* 369). He urged vehemently, at all events, if the bill should be dismissed, that the Defendant, *Lucy Maberry*, should be enjoined from taking advantage at law, of the statute of limitations, or the lapse of time which had occurred since the filing of this bill.

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HENDERSON, Judge.—We cannot sustain this as a bill of Interpleader—for in such bills the equity of the Plaintiff is to be indemnified in the *delivery* of property, of which he is in possession, and to which he claims no right. The Plaintiff not having the possession, is unable to do the only act for which an indemnity is given. But I think that he has an equity, growing out of the motion to dismiss the bill at this late period, after the Defendant has submitted to the jurisdiction of the Court. The Defendant should be restrained from computing the time which has elapsed during this litigation, in support of the plea ot the statute of limitations, in any suits which might be brought at law by the Plaintiff, for this property. There would be no doubt of this equity, if the subject matter of this suit was of equitable cognizance, and in principle, under the circumstances of the case, I think there is no difference.

From the commencement of this suit, the Defendant either believed that this Court had not jurisdiction, or that it had. If he believed the former, and had the present motion in view, he has been guilty of a gross fraud in every step taken in this cause, from which the Plaintiff might infer that he intended to try the question here. His opposition to the applition for an injunction against computing the time spent in this Court, is strong evidence that his object was to deceive the Plaintiff. If he did not know from the first, that this bill was improperly framed, but has lately been apprised of it, he wants the common feelings of humanity, in wishing to visit the Plaintiff with the most disastrous consequences, for the crime of ignorance, in which he himself so fully participated. I think that the equity of the Plaintiff is much heightened by the circumstance, that it is not the loss of property, to which he is to be subjected, if barred by the statute, which many can bear with equanimity, but he is to be overwhelmed with a large debt, which few can endure in the like manner.

This case is also of a nature well calculated to mislead upon the question of jurisdiction. The property in contest, is claimed from the same person ; the right of the parties depend upon the construction of the same instrument—the Plaintiff is an administrator, and not personally interested. He is a bare trustee ; the property was in the possession of some of the next of kin, and of persons claiming under them, and holding adversely to the claim of others also next of kin. It was therefore more convenient to go into a Court of Equity, as one suit would settle the whole controversy. And no doubt, it was thought that the want of possession, was a mere matter of form, as the persons who had it were brought before the Court, and that, upon a final adjustment, possession could as well be delivered by them, as by the Plaintiff. Under this impression, the bill, and a cross bill, were filed—answers made—depositions taken—an account ordered—the cause set for hearing—removed to this Court—and all necessary interlocutory orders made. And after all this time spent, and costs incurred, when the cause is ready for trial, this motion to dismiss is made, for want of jurisdiction in the Court, in which the Defendant has been an actor himself. Justice and Equity require, that as the Defendant now declines to submit the trial of his case to this Court, that the time which has been spent in this litigation (honestly on the part of Plaintiff) shall not be computed, in support of a bar for the Defendant, under the statute of limitations, should suit be brought at law. The advantage was either fraudulently acquired, or obtained through the ignorance of *both* parties. One should not be so highly benefitted, and the other so severely punished. But the Plaintiff must pay the costs of the suit.

Per Curiam.—Retain the bill, and direct, that if the Plaintiff sues at law, the time during which this bill has pended, shall not be computed, upon the plea of the statute of limitations.

James H. Smith, Adm'r.
of Edwin Smith,
v.
Bryan Smith.
From Johnston.

The order in which parties to a security are liable at law, is the order in which, independently of contract, they will be held bound in equity.

In equity, however, by contract, the endorser may be made accountable to the maker and the acceptor to the drawer, &c.

Where A, as surety, signed the note of B, payable to C, and it was endorsed by C, at the request and for the accommodation of B, there being no contract between A and C whereby they agree to become co-sureties of B, it was held that A had no right to contribution from C.

The bill charged that the Plaintiff's intestate in March, 1825, signed a note with one *Robert H. Helme*, payable to the Defendant for $8,911. That after signing the note, it was delivered to *Helme*, who procured the Defendant to endorse it—that the signature of the Plaintiff's intestate, and the endorsement of the Defendant, were both voluntary and for the accommodation of *Helme*, who procured the note to be discounted at the State Bank, solely for his own benefit—that *Helme* became insolvent, and the Plaintiff's intestate had paid the whole amount of the debt. It was insisted that the Defendant was a co-surety with the Plaintiff's intestate and liable to contribution, which was the prayer of the bill.

The Defendant, in his answer, admitted that he endorsed the note at the request of *Helme ;* he averred, that at the time of his endorsement, he had no knowledge that the Plaintiff's intestate was a surety, but that he then believed the Plaintiff's intestate had a joint interest with *Helme*, in having the note discounted. He denied that he would have endorsed the note for the accommodation of *Helme*, had he known that the latter was solely interested in the discount, and stated that when the note was handed to him, and his endorsement asked for, he hesitated, as the amount was large, but that *Helme* removed those doubts by informing him, that he, the Defendant, could not suffer until the Plaintiff's intestate and himself had both failed, and upon this assurance, having confidence in the solvency of the former, he endorsed the note and handed it back to *Helme.*

The deposition of *Helme* was read upon the hearing—he swore that at the time when the Defendant endorsed the note, no communication was made to the Defendant, of the relation in which the Plaintiff's intestate stood to the note —that he had stated to the Defendant, that the Plaintiff's intestate was bound to indemnify him, in case he, *Helme*, failed, but that this was given as the witness's opinion upon the point of law, not as a fact touching the Plaintiff's *intestate's* connection with the note. He further proved, that the Plaintiff's intestate had no interest in the note, except as a surety, and that in his opinion, the Defendant would not have lent his name, unless that of the Plaintiff's intestate, or some other as good, had been upon the face of the note.

Badger and *Devereux*, for the Plaintiff.—The only difference between this case and that of *Daniel* v. *McRae*, (2 *Hawks*, 590), is that there, the obligation of the parties in law, rested upon the same event, viz. : the default of the maker—here the Defendant has undertaken to pay the debt of *Helme*, if both *Helme* and the Plaintiff's intestate failed to do it, and if he had notice of their default. If the legal effect of the contract is to govern, it must he admitted, that the bill should be dismissed ; in other words, if by law, the Defendant is a supplemental surety to the Plaintiff, and the contrary cannot be shown, the latter has no claim against the former.

Sureties are made supplemental either by act of law, or by express contract. The relation of these parties to each other is of the first kind, there is no express contract between them, and that under which the Defendant seeks to protect himself is one inferred by law. It is therefore admitted, that at law, the Defendant is a supplemental surety to the Plaintiff's intestate, and that the latter has, by the forms of law, no redress against the former. But the same thing occurred between *Daniel* and *McRae ;* there *McRae* had the legal title to sue, he was an endorser subsequent to *Daniel*, and at law had a full redress against him—the forms of law therefore, made him supplemental to *Daniel*—but equity regarding the substance of the transaction, and seeing that in fact he lent his name for the accommodation of the maker, took from him the legal advantage which made him supplemental, and held him to be a co-surety. The legal priority then which exists between a prior and subsequent endorser, was of no avail to *McRae*. To hold, therefore, that the legal advantage existing in favor of the Defendant in the present case, makes him supplemental, as to hold that in one case the Court is not bound by the forms of law, but that it is in another for in what do the cases differ—in both, the object was the accommodation of the principal debtor—the liability in both was incurred at his request—no benefit resulted to the litigant parties. The Plaintiff's intestate in the present case, is in equity, as fully a surety, as the Defendant, or as *Daniel* or *McRae* were. The only difference between the cases, is that pointed out above, viz. that *McRae* and *Daniel* were endorsers, the Plaintiff was a surety on the face, whereas the Defendant was an endorser. But a Court of Equity in all cases, looks at the substance of the transaction, and universally, the only enquiry is, whether in point of fact the party against whom contribution is sought, is a co-surety, or whether he is supplemental; if he is in fact a co-surety, he is held to contribution, notwithstanding all forms, whether created by law, or by express contract.

In *Craythorn* v. *Swinburn*, (14 *Ves.* 160) *John Swinburn* gave a bond, conditioned to pay a Bank £1200, if *Henry Swinburn*, the debtor, and *Craythorn*, the Plaintiff, his surety, in a joint and several bond, did not do so—and upon a payment by either of them, then the bond was to be void. No rule of law, applicable to the present case, could more strongly put the Defendant's liability, upon the fact of a default by the Plaintiff's intestate, than the express engagement of *John Swinburn*, in that case, put his, upon the default of *Craythorn*. The words are clear and explicit. At law, the bond was discharged, the condition being performed by the payment of the debt by *Craythorn*. *Craythorn* having paid the money, filed his bill for a contribution. At law, he was clearly without remedy—his suretyship being distinct from that of *Swinburn*, and *Swinburn* clearly discharged by *his* payment. *Lord Eldon* does not decide the case upon the writing—upon the bond, nor dismiss the bill, because *Swinburn* was only bound upon the default of *Craythorn*; but he hears testimony, and enquires whether, in point of fact, *Swinburn* was a supplemental, or a co-surety; and it is expressly proved, that by *Swinburn's* contract with the Bank, he was a supplemental surety. Upon that enquiry had, it turned out that he had made no communication to the Bank—that he lent his name for the use, and at the request of the principal debtor, the result would have been different. We must infer, that his Lordship's object in hearing testimony was, to ascertain these facts, or others, which in his mind would make the Defendant a co-surety, notwithstanding the form of his obligation, and that this, if proved to his satisfaction, would have produced a decree for contribution, notwithstanding the form of the contract. To this we are driven, or to the absurd conclusion, that *Lord Eldon* did not understand the legal effect of the bond given by the Defendant. In dismissing the bill, he uses the words, "my opinion is wrong, if *Sir John Swinburn* is a co-surety." This case then, as far as *Lord Elgin* is an authority, proves, beyond a doubt, that if, by express contract, the liability of the Defendant was postponed to that of the Plaintiff's intestate; in other words, if he wrote himself out of the character of a co-surety, and made himself expressly supplemental, yet, if in point of fact, he was a co-surety, he shall be held to contribution.

The cases of *Love* v. *Wall*, (1 *Hawks* 313), and of *Daniel* v. *MacRae*, (2 *do.* 990), are express to prove, that a contract implied by law, may be varied by testimony; to these may be added, the case of *Wright* v. *Latham*, (3 *Mur.* 298.) In *Daniel* v. *MacRae*, Judge HENDERSON says, "I am at a loss to discover how the admission (of such testimony) could ever have been doubted—its admission contradicts no express written agreement, but repels an implication only."

If then, the form of the security does not prevent the *prima facie* supplemental character of the Defendant from being explained, but his relation to the Plaintiff may be shown by testimony, what is the character of that testimony? Who was the principal debtor? At whose request, and for whose accomodation were the liabilities of the Plaintiff and Defendant incurred? Who was accommodated by the discount? Was there any communication from either of the sureties to the Bank? If it be said, that the Defendant doubtless thought he made himself supplemental, it is answered so did *McRae* —so did *Swinburn*. But the rights of parties are not to be decided by their suppositions of the legal effects of their acts; if so, no person would ever think he exposed himself to a loss by his own act. The same observation may be made, as to the argument *Helme* used to obtain the endorsement of the Defendant. The law is to decide between the parties to this suit. The thoughts of *Helme* are not the rule for ascertaining them.

If it be objected that the Bank might have discharged the Defendant by not giving him notice, and thus have destroyed the Plaintiff's right; it is answered 1st, that the same thing might have been done in *Daniel & McRae*, the Bank might not have notified *McRae*—but notwithstanding this incident to the form of the contract in that case, he was held to contribution. 2nd, If the Defendant was discharged as to the Bank it would not effect the Plaintiff's right against him, as being *res inter alios acta.* But if it would, then clearly the Bank would have been bound to indemnify the Plaintiff's intestate (he being as to them a surety,) precisely as if they had discharged a mortgage made by *Helme* for their security. (*Hayes v. Ward,* 2 *Johns. Ch. Rep.* 129.)

Henderson, Judge.—The cases of *Lcve & Wall* and of *Craythorn & Swinburn,* decide not only that the order of liability arising upon the face of the transaction is the rule of this Court, as well as at law, in fixing the relation of principal and surety, and that of co-suey and supplemental surety; but that this relation may be varied by contract, whatever may be the form of the security; for that is made *diverso intuito*, and that the payer of the note may be the surety of the maker, the endorsee of the endorser, drawer or acceptor. But until this relationship is varied by evidence of such contract, the order of liability is the same here as at law, that is, such as it appears to be upon the face of the security. This seems to be admitted in argument by the Counsel for the Plaintiff, but it is insisted that the very circumstance of its being known to the Defendant that the Plaintiff's intestate, one of the makers, was not a principal in the note, but only a surety for *Helme*, created of itself this agreement of mutual liability between the maker and endorser, without any actual communication between them, and in fact, that this was so strongly the case, that no understanding of the Defendant to the contrary, in the absence of the Plaintiff's intestate, and without his knowledge, could control or vary it. This is certainly extending the doctrine farther than the principle will warrant. It is binding a person not only without his consent, but in opposition to it, and where no fraud is imputed to him; it is placing him in a grade and order of liability, which is in accordance with neither his *act* nor his *intent*, and this without the least imputation of fraud. This case certainly is distinguishable from the case of *Craythorn* and *Swinburn*. There the surety became bound, or was willing to become bound with his principal. He did not, and could not understand that any other person was to be bound as co-surety with him. In this case it is probable that *Smith*, the maker, might have understood and believed, that the Defendant would be equally bound with him, as the note could not be discounted without his agency; but if he did, this could not create an obligation on the endorser without his assent, and without fraud. His (the intestate's) understanding alone, would not change the operation of law upon the transaction. It required also the assent of the endorser, or that he should be guilty of some fraud, to subject him. To do so in this case, would be to subject him in opposition to the manner in which he bound himself, viz.: the form of the security, and also in opposition to what he intended to do, according to his declarations at the time of endorsing.

Per Curiam.—Dismiss the Bill with costs.

Lewis Ellis
v.
William Ellis.
} From Edgecomb.

The act of 1819, (*Rev. Ch.* 1016) respecting parol contracts for the sale of lands and slaves, and the Statute of Frauds, (29 *Char.* 2,) were made to effect the same object, and should receive the same construction.

Therefore, where the whole purchase money was paid, and possession delivered according to the contract, although no note in writing was made of it, a specific execution was decreed.

The Plaintiff alleged, that in the year 1821, he purchased of the Defendant a tract of land, at a stipulated price, which was agreed to be paid in a bond of one *W. J. Stanton* and *J. S. Peel*, payable to one *R. Peel*, as a guardian to the wife of the Plaintiff, and her brothers and sisters; that the bond exceeded the amount which the Plaintiff in right of his wife was entitled to recive from the guardian—and to obviate this. it was agreed, that the Plaintiff should give his bond to the guardian for the balance, after deducting the sum which was due him, in right of his wife, and that the Defendant was to become surety for him; that to indemnify the Defendant in this suretyship, a mortgage on the bargained premises was to be given him. That according to this contract, the bond of *Stanton* and *Peel* was assigned to the Defendant, a bond given by the Plaintiff and Defendant to the guardian, and the Plaintiff put in possession of the land; that from ignorance of the manner in which the deed of bargain and sale, and the mortgage should be drawn, they never had been executed.

The bill then charged, that the Defendant pretending the Plaintiff was bound to him as a guarantor of the bond of *Stanton* and *Peel*, who had proved insolvent, had refused to convey the land sold, and had commenced an action of ejectment against the Plaintiff to turn him out of possession.

The prayer of the bill was for an injunction and a specific performance of the contract of sale.

The Defendant in his answer, relied upon the act of 1819, (*Rev. ch.* 1016.) He also denied the equity of the Plaintiff's bill; but it is not necessary for the purposes of this report, to give his views of the contract of sale.

The injunction had been dissolved, and it appeared from a copy of the record of the action of ejectment, which was filed as an exhibit, that the Plaintiff had been turned out of possession, and that the Defendant had recovered for the mesne profits.

Hogg for the Plaintiff.—The Plaintiff is entitled to a specific performance. The bill is not founded on the contract, which is void in equity as well as at law, by the act of 1819. The Defendant is not obliged to convey his lands on a parol contract, until he signs a written agreement. He has a *locus penitentiæ*, and he may exercise it, provided he has practised no fraud on the Plaintiff. The right to relief is not founded on the contract, nor even on the payment of the consideration. Neither is it founded upon any supposed right a Court of Equity has to set up a parol contract void at law; but the Plaintiff applies to the ancient jurisdiction of a Court of Equity, to redress *a fraud* for which a Court of law cannot give adequate relief. He does not complain that the Defendant has refused to comply with his parol contract, but that by performing it in part, he has induced the Plaintiff to pay the consideration of the purchase, and to enter *on the possession*, and afterwards treated him as a trespasser, by ousting him by ejectment, and compelling him to pay the mesne profits in damages.

The Defendant admitted the Plaintiff to possession in good faith, and meant to make him a deed; but failing in his calculation to receive the money on the bond of *Stanton* and *Peel*, he aims, by refusing the deed, to charge his loss, arising from the insolvency of *Stanton* and *Peel*, to his innocent vendee, when, in justice, it ought to be borne by himself, as the result of his own want of information, caution or diligence.

If the Plaintiff had simply paid his money, without getting possession, he might be left to redress at law, by his action for money had and received; but by admitting the Plaintiff to the possession, and receiving his money, the Defendant has so committed himself by a part performance, that he cannot go back without fraud. Indeed he meditates a fraud in going back, and the Court will apply themselves to his conscience, and compel him to convey. In no other way can the Plaintiff be safe from the contrivance of the Defendant. He has advanced his money, and committed acts that will be trespasses at law, on the faith of possession delivered by the Defendant, and the law can afford him no adequate relief. The jurisdiction of a Court of Equity to decree a conveyance, where there has been a part performance, is established in England, notwithstanding the statute of frauds, from which our act of 1819 is substantially taken.

Generally, the dispute is, what shall be deemed a part performance. It has been a vexed question, whether payment of the purchase-money is a part performance, and it has been decided, that a part payment, by way of earnest, is not—and it is strongly intimated, that full payment will not entitle a purchaser to a specific performance; but the admission of the vendee to the possession, is a part performance, and entitles the vendee *per se* to specific relief; and certainly, the payment of the whole purchase-money, and the possession, are strong circumstances in the equity of a vendee. There is, it is believed, not only no authority, but no dictum to the contrary. (*Buckmaster* v. *Hartop*, 7 *Ves.* 345, 347.—*Butcher* v. *Slapely*. 1 *Vernon* 363.—*Clenan* v. *Cooke*, 1 *Sch. & Lef.* 22.—*Sugden's Law of Vendors*. 84, *& cases cited.*—*Newland on Contracts*, 182—185.)

Gaston, contra, contended, that the Plaintiff's right to relief was founded solely upon the contract. He insisted that ther was a material difference between the statute of Frauds (29 *Char.* 2) and our act of 1819, that the first did not annul the contract, but simply forbid an action to be brought upon it, whereas in our act of 1819, the Legislature had cautiously avoided the language of the 4th section of the statute of Frauds, that concerning contracts—and had adopted the words of the 5th section concerning wills. He observed that the English Judges had of late lamented the inconsistencies which the liberal construction of the 4th section of the statute, had generated, and that this liberality had never been applied to the 5th. By using the words of the latter, he argued that the Legislature had plainly intimated an intent to exclude the construction which the 4th section had received. He then commented upon the cases in which the 4th section had been construed, and endeavored to prove that the introduction of the principles which governed them, would introduce confusion into the jurisprudence of the State, and argued strenuously to enforce the propriety of a more simple rule of construction.

Hogg, in reply, observed, that the 5th section of the statu had, in England, received the construction he contended for; that their Courts of Equity had relieved in cases of frauds, upon devisees in unattested wills. For this he cited *Newland on Contracts*, 179.

Taylor, Chief-Justice.—I think there can be no reasonable doubt, that the act of 1819, was made to effect the same object with the statute of frauds and perjuries, so far as it respected parol contracts, of sales of land. The mischief here was of the same character with that sought to be remedied in England, and the full extent of it had recently been brought into view, by a decision of this Court, decreeing the specific execution of a parol contract, where there was no part performance.

There is some difference in the phraseology of the two statutes, but none I think in their substantial meaning. Our act makes all contracts, to sell or convey any lands, void and of no effect, unless they be put in writing. The statute of *Charles* prohibits the bringing any action upon any contract, or sale of lands, or any interest in, or concerning them, unless the agreement, on which such an action shall be brought, or some memorandum or note thereof shall be in writing, &c. As this would extend to prevent the institution of a suit in equity, as well as at law, it is equally operative with our act, since depriving the party of all remedy on a contract is equivalent to annulling it. In this view, I think, the expositions of the statute of frauds are applicable to ours, and that after a system has been built up by the judgments of a succession of able men, it would be unwise and unsafe, to depart therefrom.

In the present case, the purchase of the land was made by the Plaintiff, and he let into possession thereof with the Defendant's consent. Now, if the purchase money was paid according to contract, or there was no agreement to guaranty the note of *Stanton* and *Peel* (which is a subject of future enquiry) it is equitable that the Plaintiff should be quieted in his purchase; and indeed it would be flagrant injustice to allow the Defendant, after receiving the price, and giving up the possession, to commit a fraud, under the sanction of a statute made for the prevention of fraud. If this agreement should not be performed, the Plaintiff, by being put into possession, has had a fraud practised upon him, and made a trespasser, and liable to account for the rents and profits. To show that he entered by agreement, and thus defend himself from the charge of being a trespasser, it is allowable to prove the parol agreement, and the delivery of possession; and being allowed for that purpose, it is equally reasonable that it shall be allowed throughout. This principle is illustrated and explained in a satisfactory manner in the case of *Clenan* v. *Cooke.*

Nor does it seem that any mischief can arise under this construction, guarded, and limited as it is to those cases, where the acts done are of such a nature, that they could not possibly be executed with any other view, than to perform the agreement; for if they are equivocal, or might have been done with other views, the agreement will not be taken out of the statute. (*Ambler*, 586.) A plainer case, with respect to the design of delivering possession, cannot well exist than this; it was the clear intention of both parties, that it should be in execution of the agreement; and if the Defendant has, in fact, been paid according to contract, he ought to be enjoined perpetually, and decreed to execute a deed.

PER CURIAM.—Direct an account to be taken by the Master of the purchase-money, and let him report upon the nature of the guaranty, which the Defendant claims the Plaintiff to have given of *Stanton* and *Peel's* bond.

Frances Liles
v.
Robert Fleming, Ex'r. of Jacob Liles and others. } From Wake.

A post-nuptial agreement, made upon sufficient consideration, between husband and wife, will be enforced in Equity.

Where there was an agreement to settle property upon the wife, and the husband, by will, bequeathed that property to a stranger, it was held, the wife having dissented from the will, that her right to a child's part of the personalty, could be defeated only by a satisfaction in express words, or one resulting from a necessary implication, and there being neither, that she was entitled both to the settled property and to her child's part.

The Plaintiff in her bill alleged, that upon a treaty of marriage between her and the Defendant's testator, it was agreed by the latter, that in case there should be a child of the marriage, all the property to which the Plaintiff was entitled, either in possession or in action, should be settled upon her. That the marriage took place, and upon the birth of a son, who was named *Richard Liles*, the Defendant's testator executed the following instrument:

> "Be it known to all whom it may concern, that I, *Jacob Liles*, of &c., having intermarried with *Frances Holland*, widow, &c., and by her having had one son, called *Richard Liles*, I do hereby certify, that all the property which came by my said wife, of every description, I give to her and her heirs forever. In witness, &c."

The bill then charged, that the Defendant's testator had taken into his possession sundry slaves, and some bonds and money, which belonged to the Plaintiff before her marriage with him—that by his will he had bequeathed several of those slaves to his children by a former marriage, and in it had made a very small provision for the Plaintiff, who had regularly entered her dissent from it.

The prayer was, to have the defective instrument set up, and also for a distribution of the assets of the testator.

The Defendants, in their answers, put the Plaintiff to the proof of the ante-nuptial agreement, and insisted, if it was made, that the Plaintiff should be put to her election—contending, that she could not claim under the agreement, and also her share of the testator's assets.

The facts set forth in the bill, were fully established by the testimony of the Plaintiff's mother and sister, whose depositions were read.

Devereux, for the Plaintiff, contended, that the right of the widow to a child's part of her husband's personal estate, was a right which the law gave her; that it was similar to the right of dower at common law, and it had always been held, that nothing but express words, or the most necessary implication, should bar the right of dower.

W. H. Haywood, contra.

TAYLOR, Chief-Justice.—This bill is brought for the two-fold purpose of setting up a contract, made by the testator of the Defendant with the Plaintiff, his then wife, whereby he gave her all the property which he had acquired by his marriage with her, and to obtain likewise, a distributive share of the personal estate of her said late husband. The contract made after marriage, is stated to have been in execution of a parol treaty, made before the marriage, whereby the husband agreed to settle upon her, in the event of her having a child by him, all the property she then possessed, or was entitled to. The writing does accordingly admit, that she has a son, named *Richard Liles ;* and there is proof, by two witnesses, the mother and sister of the Plaintiff, that *Jacob Liles* had declared in his lifetime, that he had executed the paper in pursuance of his engagement entered into before marriage. The contract of marriage is a valuable consideration, and a settlement, made by the husband after marriage, is binding upon him, and all persons claiming as volunteers from or through him. How far the peculiar circumstances of this contract would render it valid, against creditors or subsequent purchasers, is not made a question in the case. The intervention of a trustee is indispensable at law, to enable the husband to convey property to his wife ; but there are several cases in this Court, where the husband's gifts to the wife, directly made, will be supported, although no property in the things given, passed to the wife at law, by the delivery. The following cases extend fully to the establishment of this principle. *Lucas* v. *Lucas*, (1 *Atk.* 270,) *Stanning* v. *Style*, (3 *P. Wms.* 338)—*Bledsoe* v. *Sawyer*, (1 *Vern.* 244, *Bunbury* 205.)

The law proceeds strictly, upon the notion of union of person in husband and wife, and it is only in some extreme and excepted cases, that the wife can implead or be impleaded, without her husband ; but in Equity, she may be a Plaintiff or Defendant, without the concurrence of her husband, as in cases where she prays relief against him. (*Terry* v. *Terry*, *Pres. Ch.* 275.—*Lambert* v. *Lambert*, 1 *Ves. jun.* 21.) And she may defend a suit separately, when her interest in the subject of litigation is contradictory to her husband's claim, and in other instances. (*White* v. *Thornborough*, *Pres. Ch.* 429.—*Ex parte Halsam*, 2 *Atk.* 50.) Equity, it is said, regards not the outward form, but the inward substance and essence of the matter, which is the agreement of the parties, upon a good and valuable consideration; so that although a covenant be extinguished at law by the marriage of the parties, this Court will establish it. (*Cannel* v. *Buckel*, 2 *P. Wms.* 243.—1 *Fonbl.* 39.)

As to the remaining question, whether the Plaintiff is to be put to her election? It is believed that the law has left no discretion on the subject; for however desirable it might be, that in so small an estate, the testator's children should exclusively enjoy the benefit of it, yet the widow's claim to distribution is founded on a clear legal right. The principle to be extracted from all the cases is, that an intention to exclude that right, must be shown, either by express words, or a manifest implication; but there is here nothing from which such an intent can be inferred.

Per Curiam.—Declare that the Defendant's testator made the agreement in the bill mentioned, and direct an account of the property of the Plaintiff at the time of her marriage; and also of the assets in the Defendant's hands.

James McCabe & wife and others
v.
Benjamin Spruil and others, executors of Charles Spruil.
From Tyrrell.

A testator directed his lands to be sold, and the proceeds divided among his "heirs not heretofore mentioned." *Held*,

1st. That the land should be considered as money, and that the word "*heirs*" meant those who were entitled under the statute of distributions.

2d. That the words "*not heretofore mentioned*" applied only to those taking beneficially under the will, and not to a legatee in trust.

This cause was heard in the Court below, by his honor Judge MARTIN, on the Fall Circuit of 1827, when the facts were, that *Charles Spruil* duly made his will, and appointed the Defendant *Benjamin*, his brother, one of his executors. After several pecuniary legacies to his relations, and among them one to the Defendant *Benjamin*, im trust for a sister of his and the testator, he devised as follows:—

"My will and desire is, that all my other estate, both real "and personal, be sold at the discretion of my executors, "and the money arising therefrom to be equally divided "amongst my other heirs, not heretofore mentioned."

Two questions were submitted to his Honor, viz.:

1. Whether the fund, created by the sale of the land belonging to the testator, should be divided among his personal or real representatives, who were parties to the suit.

2d. Whether the mention made of the Defendant *Benjamin*, in the first part of the will, appointing him a trustee for his sister, prevented him from claiming any part of the residuum.

His Honor decreed that the proceeds of the land should be divided according to the statute of distributions, and that the Defendant *Benjamin*, was not entitled to any part of the residue.

From this decree, the Defendant *Benjamin* appealed to this Court.

Hogg, for the Appellant, upon the first point, cited *Holloway* v. *Holloway*, (5 *Ves.* 402)—*Bridge* v. *Abbot*, (3 *Bro. Ch. Rep.* 224)—*Evans* v. *Charles*, (1 *Anst.* 128.) Upon the second point he contended, that by the words "heretofore mentioned," the testator obviously meant those who took a beneficial interest under the will.

Gaston and *Badger*, *contra*, cited *Croom* v. *Herring*, (4 *Hawks* 393) and *Doe ex dem. of Stewart* v. *Sheffield*, (13 *East.* 526.)

Taylor, Chief-Justice.—It is a well known rule of equity, that land directed to be sold and turned into money, shall be considered as money, unless there is some plain intention to the contrary, and whether the direction is given by will, or any other instrument, makes no difference.

What description of persons is to be understood by the word *heirs*, as applied to personal property, has not been positively settled by any adjudication, though strong opinions have at times been expressed upon it. Thus in *Holloway* v. *Holloway*, it is said, that though the word *heirs* has a definite sense as applied to real estate, yet as to personal estate, it must mean such persons as the law points out to succeed to personal property. If personal property were given to a man and his heirs, it would go to his executors. And this is the only construction we can give to it in this will, which will therefore confine the bequest to such as are entitled under the statute of distribution.

I do not think there is any sufficient reason for excluding *Benjamin Spruil* from this distribution. By excluding those who had been mentioned in the will, the testator must have meant those for whom some provision had been made; but none was made for *Benjamin*, who seems, besides, to have been an object of the testator's confidence, since he had appointed him executor, and trustee for his sister. In this respect only, the decree appealed from is incorrect.

PER CURIAM.—Let the decree below be affirmed, as to so much of it by which the mode of distribution is pointed out, and reversed as to the exclusion of *Benjamin*. Let the costs of the Court below be paid out of the fund, and the costs of this Court by the Plaintiffs.

William Petty & Lavinia his wife
v.
Hezekiah Harman,
From Chatham.

Satisfaction of an open trust is not presumed from lapse of time, but a settlement between the trustee and *cestui que trust* changes the character of the trust and subjects it to the presumption of satisfaction Therefore, where a settlement was made between an Administrator and an infant distributee nearly of age, and not afterwards disaffirmed by the infant, It was held, that the lapse of twenty-two years raised the presumption of satisfaction.

Per HENDERSON, Judge, the case of *Falls* v. *Torrance*, was decided upon the ground that the trust was an open one, and never had been closed.

The Plaintiffs in their bill, which was filed in 1824, alleged that *William Dilliard* died in the year 1781, leaving the Plaintiff *Lavinia*, his only child, an infant of only three weeks—that administration upon his estate was committed to *Keziah* his widow, who afterwards intermarried with the Defendant—that *Dilliard* at his death was possessed of a female slave, and of other personal estate—that the Defendant, in right of his wife, administered his estate, sold the property except the slave, which he converted to his own use, and collected the debts, particularly a large one due from one *Thomas*.

It was then averred, that before the Plaintiff *Lavinia* arrived at full age, viz.: in the year 1801, the Defendant *Harman*, and one *William Petty, sen.*, the grandfather of the Plaintiff *Lavinia*, with a view of making her half brothers and sisters, also grandchildren of *W. P. sen.*, equal in point of property with the Plaintiff, fraudulently procured her to accept of two negroes, and give a release of all her claims upon the estate of her father—that *Keziah*, the widow of *Dilliard*, and the wife of the Defendant, was dead—and that the female slave had many children, who were still in the possession of the Defendant.

The bill then set forth the intermarriage of the Plaintiffs, and prayed a discovery of the number and names of the descendants of the slave of which *Dilliard* died possessed; that the release given in 1801 might be declared void, and for an account and distribution of the personal essate of the intestate.

The Defendant, in his answer, alleged that *Dilliard* never owned the slave mentioned in the bill, and insisted that she was only lent him by *William Petty, sen.*, the father of his wife. He denied that he had ever received anything from the estate of *Dilliard*, and that he ever knew, until within a short time, that *Keziah*, his wife, had administered; and averred, that he had always thought administration had been committed to her father *William Petty, sen.* He stated, that after his intermarriage with the widow of *Dilliard*, her father had told him there was some property of his, *Dilliard's* to which Defendant and the Plaintiff *Lavinia* were entitled; that it consisted of money, and a debt due by one *Thomas*; and that as he, the father, was old and infirm, he suggested that the Defendant should take the control of the debt, which was in amount about equal to the share of the estates, to which the Defendant, in right of his wife, was entitled. That the Defendant acquiesced in the proposal, and the more readily, as he did not know that his wife, independently of her father, was entitled to anything—that understanding *Thomas* to be insolvent, he had, for a trifling consideration in goods, assigned the debt to a merchant in the neighborhood.

It was admitted, that the Defendant had possession of the slave mentioned in the bill, and of her increase; but insisted that he claimed them under an advancement made *Keziah*, after her intermarriage with the Defendant, by her father *William Petty*, the elder.

As to the release, it was alleged, that the Defendant feeling uneasy at some reports in the neighborhood respecting a gift of the slave by *William Petty, sen.* to *Dilliard*, had as he then believed, on the day when the Plaintiff *Lavinia* came of age, but as it afterwards appeared, on the day when she was twenty years old, caused a meeting to be had at *W. P's, sen.* where the Plaintiff *Lavinia* then lived, at which were present the most respestable people in the neighborhood, where the whole matter was discussed, and when the Defendant and *William Petty, sen.* conveyed to the Plaintiff two negroes by way of advancement, and for the purpose of settling her claims to her father's estate—the Defendant insisted that these two negroes were much greater in value than the share of the Plaintiff *Lavinia* in the estate of her father, and that the settlement was liberal from the natural affection of the grandfather, and from the regard which the Defendant had to the Plaintiff *Lavinia*, who had been nurtured by him from her infancy—all fraud and concealment was denied and the transaction insisted to have been fair. The answer averred, that the Defendant's wife had died in the year 1820, and *William Petty, sen.* in 1822, thet the Plaintiff *Lavinia* came of age in 1802 and married in 1806, and lived in the neighborhood of the Defendant until the year 1811, during which time no complaint had ever been made of the settlement, and the Defendant prayed the benefit of any presumption which could arise from this lapse of time. The Defendant also alleged, that he had been in possession of the slave mentioned in the bill, and her increase, from the year 1784 up to the time of filing this bill, claiming them as his own, and insisted upon any benefit he might derive under the statute of limitation. The allegations of the answer were fully supported, in the opinion of the Court, by the testimony. It particularly appeared from the copy of the record of a suit against *Thomas*, that the execution against his bail was under the control of the merchant, to whom in his answer, the Defendant averred he had assigned the debt.

W. H. Haywood, for the Plaintiffs, referred to *Falls* v. *Torrance*, (2 *Hawks* 490—4 *Do.* 412.)

Manly, for the Defendant, cited *Ivey* v. *Rogers*. (*Ante* 58.)

Henderson, Judge.—It has been very impressively urged upon us, in a short and pithy argument, that this claim is not barred by lapse of time ; and the case of *Falls* v. *Torrance*, is cited as in point. In that case, we considered the trust, as to the negroes, an open one ; for it was very clearly shown, by documentary evidence, that they never were brought into account, because of an unfounded claim of the widow. Frequent recognitions of these facts were made during the whole of the period relied on, as furnishing evidence of a satisfaction. In this case, however, it does not appear that any part of the father's estate was not brought into account. As to the interest, that was necessarily passed on when the principal was; and although the Plaintiff being an infant, was not bound by the settlement made by her grandfather, yet she was of mature years, and knew that it had been made, was able to understand it, and communicate to her husband what had been done. Now, after waiting more than twenty-two years since she came of age, and she was twenty-four or five when she married, and after the death of her grandfather, who had a principal share in the settlement, nay almost the sole management of it, this claim is preferred.

There is one circumstance which is strong in support of the Defendant's answer—it is *Thomas's* debt. He swears it was considered to be worth but little, *Thomas* being insolvent, and that he took it as such, and sold it for a small sum. The record filed as an exhibit, confirms him in this, for it appears that the judgment was collected from the *bail.* I think this is not an open trust; but that it was closed in 1801—at least that it then lost that characte, notwithstanding the infancy of the plaintiff. Her infancy it is true, protected her from being bound by the settlement, but it did not prevent the character of the trust from being changed.

Per Curiam.—Let the bill be dismissed with costs.

* * *

Jesse Kirby, Executor of Samuel Kirby
v.
Sally Dalton and others,
From Rowan.

Where the vendee of lands received no title—but only a bond to make one upon the payment of the purchase-money, the dower of his wife in the land is not protected against the debt due the vendor for the purchase-money.—Is the wife entitled to dower at all? *Qu*

The Plaintiff in his bill, alleged, that his testa or in his lifetime, sold a valuable tract of land to one *Jonathan Dalton*, for the sum of six thousand dollars; that no title was given to *Dalton*—but the testator executed a bond to convey upon the payment of the purchase-money, and *Dalton* had sundry payments on account of the purchase-money, and that a balance thereof was still due. The bill then stated, that *Dalton* was dead, and his estate insolvent; that the Plaintiff could not recover the balance of the purchase-money, without a sale of the land; and the prayer was, that the lands might be sold, and the proceeds applied to the satisfaction of the debt due the Plaintiff.

The heirs of *Dalton*, who were made parties, in their answer insisted, that their ancestor had been ousted of part of the land, by older and better title, and claimed a reduction of the price on account thereof.

The Defendant *Sally*, the widow of the vendee, in her answer, averred, that dower in the premises had been assigned to her, and insisted, that so much thereof as was covered by it, was not liable to the debts of her husband.

The allegations above mentioned, were all supported by the proofs.

Nash, for the Plaintiff.

Devereux, for the Defendants.

Henderson, Judge.—I cannot perceive upon what grounds this bill can be resisted. The vendor retained the title, for the purpose of securing the payment of the purchase-money, and he has a right in this Court to have his contract specifically executed, which is the object of this bill. As to the claim which the widow sets, of having her dower protected from this demand, it is equally unfounded. The dower, protected by the law against the debts of the husband, is dower in the lands of the husband. This never was the land of the husband; or if it was, while in his hands, it was at all times subject to this debt. This claim is therefore above the husband's interest. The lands came to his hands, if they came at all, subject to it. There can be no pretence for exemption.

I have considered this case, as if the widow was entitled to dower in her husband's equities, which this court has more than once decided against. But if she was, she would take subject to a superior equity, and this is certainly one of that description.

As to that part of the answer which claims a deduction from the stipulated price, because the vendee was evicted from a part of the land by a superior title, it is certainly good, and the extent of the loss must be enquired into.

Per Curiam.—Direct an account to be taken of the purchase-money unpaid—and let the Master ascertain the value of the land from which the vendee has been evicted, in relation to the price given for the whole tract. Let him also ascertain the value at the time of the eviction, computing the interest on both valuations.

Burwell Simms
v.
Nathaniel Thompson and
Winifred, his wife,
From Wake.

For the recovery of legacies, filial portions, and distributing shares, the County Courts are Courts of Equity, and have all the powers of such Courts. Upon proper cases, they may review or rehear their own decrees. But where a decree was made which disposed of the cause, it was held to be equivalent to an enrolment, and that they had no power at a subsequent term, to rehear that cause.

A review cannot be had for mistakes in a decree, which might have been rectified by proper attention.

The petition, which was filed in the County Court, at February term, 1824, set forth, that the Defendant *Winifred*, with several others, who were distributees of *William Simms*, filed their petition at November term, 1820, against the Plaintiff, as Administrator of said *William*, for distribution of his estate; that at February term, 1821, of the said Court, the Clerk was ordered to take an account of the administration of the Plaintiff—that according to this order, the parties appeared before the Clerk, when the account was taken, which was in every respect satisfactory to the Plaintiff—that, after the settlement, the Clerk handed to the Plaintiff some memoranda, as guides to him, in his payment to the distributees; that the Plaintiff then supposed these memoranda were incorporated in the account, and that the decree would be entered accordingly. But that he had learnt only within a few days, that the decree had been entered up for the whole distributive share of the Defendant *Winifred*, omitting sundry payments made her on account of it—and that she having intermarried with the other Defendant, he had sued out a *Scire facias*, and was pressing an execution for the whole amount of the decree. The Plaintiff prayed that the original decree might be reviewed and corrected ; and also for a rehearing.

The Defendants, in their answer, denied the existence of the errors alleged in the petition, and insisted, that if they existed, the Plaintiff was without remedy, the decree in the original cause, being final—as it disposed of the cause, and even of the costs.

The original decree was filed with the answer, as an exhibit. It was entered at August sessions, 1822. By it, the shares due the several distributees were settled, the costs disposed of, and an execution awarded.

At February term, 1824, of the County Court, the Clerk was directed to take anew the accounts between the parties. By his report, it appeared, that the errors of which the Plaintiff complained existed, and the County Court made a decree for the Plaintiff, correcting the former decree, from which the Defendants appealed.

In the Superior Court, his Honor Judge DANIEL, on the Fall Circuit of 1827, dismissed the petition, being of opinion, that the County Court had full power to rehear or review a decree, upon petition on a proper case, but that there had been a final decree in this cause, and that, in substance, the petition sought for a rehearing of it. Whereupon, the Plaintiff appealed.

This Court desired *Devereux*, who appeared for the Plaintiff, to confine his observations, to the question, whether this was a proper case, either for a rehearing or a review. Upon which, he contended that it was. He insisted that decrees upon bills for an account never were enrolled, and the reason was, that if they were, the hands of the Court would be tied up, so that they could not correct any mistakes which might be made. That if this rule was necessary in the English Chancery, the same, or some one similar to it, should be adopted in this State, where the Courts were limited in the duration of their terms, and where business was frequently concluded in haste. He contended that all the rules and practice of the Court of Chancery, showed an extreme caution upon the subject of mistakes in accounts. He cited *Staunton* v. *Oldham* (2 *Atk.* 382.)—*Tothill's Proceedings* 42.—*Beame's Orders* 3.—*Cooper's Equity Pleading* 90.—1 *Newland's Practice* 38.—*Eyler* v. *Ward*, (*Dickins* 58,) *Yow* v. *Townsend*, (*Do.* 59,) *Wallis* v. *Thomas*, (7, *Ves.* 292,) *Pickard* v. *Matthews*, (*Do.* 293).

He contended also, that this petition might be considered as a petition for a review; and that a mistake not known to exist at the time the decree was entered, was precisely, in principle, like evidence newly discovered, which was clearly ground for a review; and on this point was cited *Patterson* v. *Slaughter*, (*Ambler*, 293.)

W. H. Haywood, for the Defendant.—The County Court cannot *review* or *rehear* decrees pronounced in that Court in cases of petition. Such power is not *expressly* created by the acts of assembly, which confer a right in the Court to hear causes upon petition. The rules of Chancery are not made the rules of the County Court, but the manner of proceeding is *pointed* out by the Legislature, which differs from Chancery in important particulars. 1. A cause may be heard at the same Court which sets it down for hearing, and in some degree summarily, and without regard to form. 2. The Defendant may refuse to answer, and no process for *contempt* issues, but a judgment *pro confesso* only. 3. The decrees o the Court are to be enforced by writ of *fi. fa.* or *ca. sa.* and not by the process of *attachment*. (*Revisal pages* 120, 218.) There is therefore no reason to *imply* that the Legislature intended to establish the rules of Chancery for the guidance of the County Court.

The County Court has only a *special limited* jurisdiction by petition, for the recovery of legacies, filial portion and distributive shares of intestates estates, against guardians and administrators—their decrees are conclusive in the Court which pronounces them—the jurisdiction was given only to save in such cases the expense and delay of a suit in Chancery—to protect either party from injury by errors in *law* or *fact*, a right to appeal is secured by the act of assembly—when the decree is pronounced and the Court has adjourned, the parties are no longer before that tribunal, and no process is provided by which they can *supercede* such decree or again bring the parties before them. (*Rev.* 120, 219, 312.)

The decrees of the County Court may be *enjoined* in Equity, for the very grounds laid in this petition. (*Holding* v. *Holding*, 1 *Murphey*, 10.)

That the Legislature intended to confer no other powers than those which by the acts are specially enumerated, is manifest from the *proviso* in the act of 1762, that nothing therein should abridge or restrain the powers of the Court of Chancery. (*Revisal* 120 and 219.)

The reasons for which bills to *review* and petition to *rehear* are allowed in Chancery, do not apply in any manner to a case like this—either party might have appealed, and the case would be tried *de novo*. (*Rev. p.* 312, 219.) Upon proper grounds, the Court of Chancery would enjoin and issue a writ of *certiorari*. (1 *Mur.* 10---3 *Mur.* 159,) and to allow the introduction of all the strict rules of Chancery in the County Court would produce incalculable mischief to the repose and quiet of families.

This question has been settled in this Court in the case of *Kennon and wife* v. *Branson*. (*Ante* 64,) not in *terms*, but in *substance*.

2. But concede the power to *review* or to *rehear*, it will at least be required that the grounds of the application shall be such as would move a Court of Chancery to act. And in that Court, this decree could not be *reheard*, because it was *final* and *enrolled* before this petition was filed. (2 *Maddox*, 370—1 *Newland's Chancery*, 360.)

It was unquestionably *final*; for it disposes of the whole controversy, and dismisses the parties from the Court—either party might have taken an appeal—even the costs are adjudged to be paid.

It was *enrolled*; or that was done, which, in our practice, is tantamout to enrolment, before this petition was filed—to wit: the decree was recorded, and the Court had adjourned. (*Kenan's Ex'r.* v. *Williamson*, 1 *Hayw. Rep.*—*Jones* v. *Zollicoffer*, 1 *Car. Law Rep.* 376.—*Ibid. Term Rep. N. C.* 21.)

The decree could not be *reviewed*—for this petition does not ask a *review*—and it does not disclose matter for a Bill of Review in Chancery, which must be for error in law apparent—or new matter discovered. (1 *Newland's Ch.* 368.—2 *Maddox Ch.* 408.)

The cases cited by the Counsel do not establish the position for which he contends, that a "*decree upon an account is never enrolled.*" These cases only prove that a decree *for* an account, viz.: an orderi n the cause directing that the Defendant *shall account*, is never enrolled. But after the account is taken and confirmed, and decree final thereon made, the whole is enrolled, and cannot after be *reheard.* And the reason why decrees to account are not enrolled, is, that the Court may reserve the right of instructions to the Master further, and, if need be, different from those originally furnished, in taking the account. This is evident from the case in *Dickens*, and is abundantly established by a reference to the numerous precedents of enrolled decrees pronounced upon accounts, collected in *Harrison's* and *Newland's Chancery.*

In fine, we may view this cause in every point, and it still presents itself as nothing more or less, than a petition in the nature of an original Bill in Chancery, for relief from an alleged mistake or surprise in the trial of the first suit in the County Court.

TAYLOR, Chief-Justice.—The expense and delay incident to an application to Chancery, for legacies or distribution, was too obvious a mischief not to call for a remedy, more especially when there was but one Court of that description existing in the then colony, and a great proportion of the rights sought for, were comparatively of small amount. This remedy is applied by the act of 1762, and the mode of it is, by investing the Superior and County Courts with equity jurisdiction on these subjects. To insure a speedy trial of such causes, certain rules were prescribed by the Legislature, and these must undoubtedly be observed, as far as they extend; but where a case arises, that is not provided for by these rules, recourse must be necessarily had to the practice of a Court of Chancery.

The jurisdictions are concurrent on the subjects contemplated, but in the inferior Courts, means are adopted to accelerate the trial of causes. To construe the powers conferred on these Courts, as an exclusion of others, would be to deny the right of awarding a new trial, or of granting an appeal, neither of which are provided for by the law, though they have been constantly exercised, as well as many others appertaining to the equity jurisdiction. Nor can any reason be imagined, which justifies the propriety of refusing to rehear or review a decree in the County Court, whilst a decree made in the Superior Court is subject to this revision. It never could have been the intent of the Legislature, that an imperfect degree of justice should be administered, when the decree was rendered in the County Court, when they are cautious to secure a full measure of it in the Superior Court, by guarding against any construction which may tend to abridge the powers of the latter, in expressly providing that the powers of the Court of Chancery shall not be limited as to such subjects. The whole spirit and object of the act require a construction, which shall put those Courts fully into possession of the means of doing justice, when they are applied to; otherwise they will cease to answer the purposes of their establishment, for they cannot "proceed to hear and determine the same, according as the matter in equity and law shall appear to them, without regard to form," unless they can also rehear and review the same, upon a proper case being made.

Having no doubt as to the authority of the Court to rehear and review, it is necessary to enquire whether this forms a proper case for either.

The only two grounds upon which a bill of review can be maintained, are, 1st, for error apparent on the face of the decree; 2d, for new matter discovered since. The subject of complaint made in this petition is, that the Clerk showed the petitioner a statement, according to which he understood the account was to be settled; but no error appears on the face of the decree, and the ground of complaint was known to the petitioner, before the decree was entered. He alleges, that when the decree was made, he thought the account was settled, in the manner the Clerk told him it would be, but an ordinary degree of vigilance would have saved him from this mistake.

It is clear that after the enrolment of a decree, the cause cannot be reheard and although we have no regular enrolment in this State, according to the practice in Chancery, yet it has been uniformly considered, that after the term at which the decree was heard, if it was final, and the parties out of Court, such was equivalent to enrolment. Nor does any difference exist between decrees on accounts and others;

for the cases only show, that decrees to account are not enrolled, not that the decree made after the account comes in is not enrolled. This is plain, from the reason given in the book; the first decree is not enrolled, because it ties up the hands of the Court from relieving, if there should have been any defect in the directions of the decree. But after the account is returned by the Master, and the parties have an opportunity of excepting, there can be no reason why the final decree should not be enrolled; more especially as according to Lord *Bacon's* second ordinance, an error in calculation, (miscasting) may be rectified without a bill of review.

Per Curiam—Let the decree below dismissing the petition, be affirmed.

Aaron L. Gomez,
v.
Aaron Lazarus & others, } From Cumberland.

A bill was accepted for the accommodation of the drawer, and this fact was known to the endorser, who, when his endorsement was made, received from the drawer a bond and mortgage, conditioned to be void if he should be indemnified against that, and any subsequent endorsement. The drawer then conveyed the mortgaged premises, in trust, to secure all his debts, with instructions in the deed, to his trustee to pay such debts first "as may be endorsed by the said" endorser. After this conveyance, the bill being protested, was taken up by giving the holder, the note of the drawer, with the acceptor and endorser, as sureties, which was paid by the acceptor, who procured an assignment of all the securities in the hands of the endorser and the holder. *It was held,*

First, That there being no contract, whereby the endorser and acceptor agreed to become co-sureties, the latter had no right to contribution from the former.

Second, That the endorser being liable only upon the default of the acceptor, the latter could not be subrogated to the rights which the holder had against the former.

Third, That the mortgage being made for the personal indemnity of the endorser only, and not for the security of the *debt*, the acceptor had no right to pursue the fund, and that the endorser being indemnified by the acceptor's payment, the mortgage was *functus officio.*

Fourth, That a mortgage to secure subsequent endorsements rested merely in contract, and was available for those only, which were made while the property remained under the control of the mortgagor.

The pleadings and proofs in this cause were exceedingly voluminous; it is believed that the following is a correct statement of the facts, which were either admitted or proved:

Jacob Levy, a resident of Fayetteville, in this State, in April, 1819, procured the Plaintiff, a Commission Merchant in New York, with whom he was in habits of business, to accept his bill of exchange for $5000, payable to one *Clark*, whose endorsement, as well as the Plaintiff's acceptance, was for the accommodation of *Levy*. There was no communication between the Plaintiff and *Clark* respecting their liabilities for *Levy*. *Clark* knew that the Plaintiff's acceptance was for *Levy's* accommodation; and *Levy* informed him, that he should consign to the Plaintiff produce to meet the bill. The bill was discounted at the Bank of Cape-Fear, for the accommodation of *Levy*. When it was drawn, *Levy* executed a bond to *Clark*, in the penalty of $15,000, with a condition to be void in case *Levy* should indemnify him against loss, by means of any endorsements or suretyships. To secure this bond, *Levy*, on the same day, executed a mortgage upon his property in the town of Fayetteville; which deed was not recorded until August, 1822.

In July, 1819, another bill was drawn, similar to the first, and in renewal of it, when *Levy* executed another bond to *Clark*, with a condition to be void in case *Levy* should indemnify him against all liabilities which *Clark* had then, or might thereafter incur, for his accommodation. To secure this bond, *Levy* executed, on the same day, a mortgage on his property in Wilmington, which mortgage never has been recorded.

In November, 1819, *Levy* being largely indebted to the Bank of Cape-Fear, the State Bank, and the Bank of the United States, by promissory notes, to which the Defendant *Lazarus*, *Clark*, and several others, were sureties, made a general assignment of his estate, including the property mortgaged to *Clark* by the two deeds of April and July of that year, to *Lazarus* and one *McRae*, for the indemnity of his endorsers and sureties, *pari passu*. *Lazarus* and *McRae*, at the time of the assignment, had notice of the two mortgages to *Clark*, and the last clause of the assignment was as follows:—" And whereas *John Clark, Esq.*, hath a lien upon part of the property herein conveyed, for his endorsement made for the said *Jacob Levy*, it is further understood, agreed, covenanted and granted, and the trustees aforementioned are hereby directed, in order to extinguish said claim, first fully to pay and satisfy, out of the proceeds of the sale or sales aforesaid, so much of the debt of the said *Jacob Levy*, in the Banks aforesaid, as may be endorsed by the said *John Clark*."

The acceptance by the Plaintiff of *Levy's* draft in favor of *Clark*, was renewed by re-drawings, until February, 1820, when it was protested and the holder, the Bank of Cape-Fear, then received from *Levy*, the Plaintiff, and *Clark*, their joint and several, promissory note, for $5,200, to secure the principal, and damages on it. *Levy* and *Clark* becoming insolvent, suit was brought upon this note against the Plaintiff, in New York, where it was finally recovered of him, under a decree of the Court of Chancery, by which the holders were directed to assign to the Plaintiff all the interest which they had in the trust fund, created by the deed of November, 1819, to *Lazarus* and *McRae*, so far as it extended to the note of $5,200. An assignment was executed, according to this decree by the Bank of Cape-Fear, in June, 1824; and in January, 1825, *Clark* also assigned to the Plaintiff all the right which he had to the two mortgages made to him by *Levy*, and also, all his right under the assignment made to *Lazarus* and *McRae*, so far as the latter extended to indemnify him against his endorsement of the bill upon the Plaintiff, or his suretyship for the note of $5,200.

The Bank of the United States, the State Bank, and the Bank of Cape Fear, together with *Levy*, *Clark*, *Lazarus*, *McRae*, and all the sureties of *Levy* interested in the assignment, were made Defendants.

The Plaintiff insisted that he was, both by the rules of a Court of Equity, and also by the assignments of the Bank of Cape-Fear and of *Clark*, entitled to the benefit of the two mortgages made to *Clark*; that it was the object and intention of *Levy*, in his assignment of November, 1819, to preserve this right to the Plaintiff, as well as to *Clark*, and that if it was not preserved and secured by the assignment, it was by reason of a mistake. The bill prayed that any mistakes or omissions might be corrected; that the Plaintiff might be decreed to stand in the place of *Clark* and the Bank of Cape-Fear, in respect to their claim upon the trust fund, on account of the debt which he had paid, and for the account of that fund and payment of the money he had paid as surety for *Levy*.

The cause was argued at the last term, and held by the Court under advisement until the present.

Gaston for the Plaintiff.—The mortgage by *Levy* to *Clark* was incorporated with, and made part of, the deed to *Lazarus* and *McRae*. Whatever right, therefore, *Clark* had under the mortgage, he has under the deed. The mortgage protected him from the payment of this debt, and the deed must be held to do the same. To the argument that the joint note was given after the deed to *Lazarus* and *McRae* was delivered, and that the deed annulled the mortgage as to subsequent endorsements, it is admitted that the mortgage could not avail to protect a perfectly new endorsement. But here the endorsement was given to secure the old debt, that was in existence when the deed to *Lazarus* and *McRae* was executed, and this Court will look at the substance of the transaction, viz. the renewal of the debt, only making the form of security different.

The facts then present the ordinary case of a payment by a surety. Can it be denied that he has a right to all funds created for the payment of the debt, especially when the debt was incurred upon the credit of that fund? Generally, and I may say universally, whenever property is pledged by a debtor to pay his own debt, any person who pays it may resort to that fund for indemnity. (*Hays* v. *Ward*, 4 *John. Chan. Rep.* 123.—1 *Eq Cas. Ab.* 93, *Pl.* 5.)

From the case of *Daniel* v. *McRae*, (2 *Hawks*, 590,) it might be well contended, that the parties to the bill originally drawn, viz. *Clark* and the Plaintiff, were co-sureties: but waving that question, and admitting that both at law, and in this Court, *Clark*, as a surety was supplemental to the Plaintiff, and that the former had a right to full indemnity from the latter—then the case is, that between the Plaintiff and *Clark*, the Plaintiff is a principal debtor; and has not the surety a right to all indemnities which exist in the hands of the creditor?

That the Plaintiff is a surety, notwithstanding the form of his engagement is admitted. Suppose, then, the holder had taken a mortgage for his indemnity the case of *Hays* v. *Ward* proves that he is to hold this as a trustee for the Plaintiff; and can it be different when one who stands on middle ground; who is accountable to the holder, but has a remedy over upon the Plaintiff, should not hold all his securities for the benefit of him against whom he has a remedy? (*Ex parte Rushforth*, 10 *Ves*. 409.)

Hogg, for the Defendants.—The parties to the deed of trust are *Levy*, *McRae* and *Lazarus*. The deed is executed to counter-secure *Lazarus*, *Clark*, and other securitiesof *Levy*, upon certain negotiated papers set forth in the deed. *John Clark* had prior liens upon part of the property, not duly registered, and void at law—their validity in equity, depending on a question to be decided in a Court of Chancery, as to notice—*Levy*, to settle all controversy on the subject of *Clark's* priority, inserted in the deed between himself and *Lazarus*, a covenant to the effect following:

"And whereas *John Clark* hath a lien upon part of the "property herein conveyed for his endorsement, made "for *J. Levy*, it is further understood and covenanted, "&c., and the trustees are hereby directed, in order to "extinguish said claim, first fully to pay and satisfy out "of the proceeds of the sale, so much of the debt of said "*Levy*, as may be endorsed by said *John Clark*."

Gomez is not entitled on the deed directly, and without substitution. The deed is not made for the benefit of any person except *Clark*, and the sureties mentioned. *Clark's* priority is to be preserved, and his security extended to *all* the property instead of a *part*, and subject to that priority, the other sureties are to be secured by the residue of the property. Neither the Banks nor *Gomez* are objects of favor with *Levy*, nor *named* in his stipulation with *Lazarus*; not being named in the covenant, nor described, they cannot take for themselves directly and without substitution. The meaning of the covenant is, to postpone the sureties named in the deed to *Clark*—*Clark* was the favored surety, and the *debts* on which he was bound, were favored *only* so far as it was necessary to make him safe, and no farther. If *Gomez* had executed a note negotiable in Bank, for his own benefit, and *Levy* had signed it for his accommodation, and *Clark* had endorsed it for the accommodation of both, in terms set forth in the covenant, it would have been the debt of *Levy*, and endorsed by *Clark*. Yet neither the Bank nor *Clark* could have compelled the trustees, *Lazarus* and *McRae*, to pay that debt, until the property of *Gomez* was exhausted, because not until then, would it be necessary for *Clark's* indemnity. But if *Gomez* could not pay it, it would be necessary to satisfy it, to protect *Clark*, and the trustees must pay it. It is the same thing whether the liability of *Gomez* precede that of *Clark*; because *Gomez* is the principal debtor, and *Levy* his surety and *Clark* the surety of both; in either case, *Gomez* comes before *Clark*, and *Clark* is never liable, till *Gomez* fails. The covenant gives *Clark* only the preference of the other sureties mentioned, and subject to such liability, prefers them to *all others*. The debt is to be paid to the Bank out of the property, and by the trustees, when *Clark* is liable, and not before; *Clark* had two securities to look to *Gomez* the acceptor, and the trustees. He has suffered the acceptor to pay, and so he is safe. The acceptor makes application to the trustees, and insists they received the property in trust for *his benefit*, and to indemnify him. They answer, he is not named in the deed, and upon the whole deed and upon the expressions in the covenant, that they were only to countersecure *John Clark* for his endorsement—*when he had suffered for his endorsement.* That subject to his security, they held the property in trust for the other sureties, who were equally meritorious creditors with *Gomez*, (supposing him to be a surety) and had a special lien on the property, discharged from the demands of all persons except *John Clark*, and those who could be subrogated to his rights, and that *Gomez* was neither the surety of *Clark*, nor his co-surety, but liable before him at law and in equity, and therefore cannot be subrogated to him. If the construction be correct, that the debt of *Gomez* is to be paid at all events, then, if the property in the hands of the trustees, be insufficient to pay all the endorsements of *Clark* mentioned in the deed, and those out of it, *Gomez* will be upon an equality with *Clark*, and will receive from the trustees as against *Clark*, such a part of the proceeds as will be in the ratio of his (*Gomez's*) acceptance to the whole sum for which *Clark* is liable as an endorser. This surely never could have been the intent of *Levy* or *Clark*; a construction leading to such a consequence should not be made by the Court, except upon particular and insurmountable expressions, which would control the general intent of the covenant, *namely*, *Clark's indemnity.* The particular expressions, and the general intent of the covenant, to indemnify *Clark* to the extent of his liability for his endorsement and no further, stand together. The covenant having provided for *Clark's* indemnity, can be extended no farther, without prejudice to him, and the other persons, for whose benefit the deed was made, and will at their expense and loss, save Go-

mez, who does not appear to have been thought of, at the time the deed was executed.

The covenant is worded, so as to direct the trustees to pay off the debt of *Levy*, and *protect Clark* from the consequences *of his endorsements;* and it is sought to be construed, where *Clark* is not liable to pay on his endorsement, to *protect Gomez on his acceptance*, to the injury of the other sureties, who are to be postponed to *Clark* only, on a certain, not improbable state of the fund, to the injury of *Clark* himself.

Gomez can have no relief against the trustees (*Lazarus* and *McRae*) in the deed of trust of November, 1819, except through *Clark*. The Plaintiff, if he can have the benefit of *Clark*'s securities, must have them because he is the creditor of *Clark* as well as *Levy*, and has a right to resort to the property of *Levy*, conveyed to counter-secure *Clark*. But the Bank of Cape Fear (and not *Levy*) is the *creditor*, and the Bank has a right to go to *Clark's* lien, whenever it has a right to resort to him personally. The Plaintiff, therefore, if he has a right to resort to *Clark's* lien, has it, either because he is the surety of *Clark* on the Bills of Exchange, or because he is his co-surety: if he be *Clark's* surety, on payment of the debt, he has a right to look to *Clark*, and of course to his liens for the whole sum expended by him. But he is not the surety of *Clark*. He does not undertake that *Clark* will pay, and that if *Clark* does not, he will; it is just the reverse: *Clark* undertakes that *Gomez* will accept and pay, and if *Gomez* does not, that *he will*. *Gomez*, therefore does not undertake to accept and pay for *Clark*, but for *Levy*, and he is not the surety of *Clark*, but undertakes to advance money for *Levy*. *Clark*, at the instance of *Levy*, enters into a guarantee with the Bank of Cape Fear or whoever shall become the payee and holder of the bill, that *Gomez* shall comply with the engagements: *Gomez* is not, then, the surety of *Clark* on the bill. Is *Gomez* the co-surety of *Clark* on the bills? Let it be supposed that *Gomez* and *Clark* are both volunteers, and thus far stand in the same relation to *Levy*. Do they, on the negotiable instrument, stand upon an equality? Are both bound for him, in the same contract, for the same act? If there be no agreement between *Gomez* and *Clark*, to aid each other, yet if there be an *equality* between them, in their responsibility for *Levy*, if their contracts with the Bank enables it to resort indiscriminately to one or the other, at its pleasure, or to both, they are co-sureties, and equally bound. But they are not so bound, for *Clark* was bound for *Levy*, while *Gomez* was free. *Clark* undertook with the Bank of Cape-Fear, that the mercantile security negotiated to them by *Levy* should be accepted and paid according to its tenor, or if not, that he would pay it to them for *Levy*. If *Gomez* did not choose to accept, *Clark* could never look to him. The equality, therefore, did not exist at the discount, nor before acceptance. When the bill was purchased by the Bank, there was no mutual and reciprocal undertaken between *Clark* and *Gomez*, for *Levy*; but *Clark* stood upon the paper the sole surety of *Levy*, and the Bank looked to him alone:—upon his name, and that of his principal, they advanced their money. How did *Gomez* write his undertaking on the paper? He agreed, on the written request of *Levy*, to pay the sum of money mentioned in the writing to the Bank; and so *performed* according to the undertaking of *Clark*. Did he enter into the same agreement with *Clark*?—he did not: but undertook to pay the money unconditionally, by which the Bank acquired a new and additional security, to which, according to the principles of equity (and indeed of law, in the case of an acceptor,) *Clark* had a right to resort, if he should pay the money to the Bank. If *Gomez* had taken a lien on *Levy's* property, for his security, or if he had given the Bank *one* of his own, *Clark* would have had, in equity, a right to resort to either of these securities, on the ground that he and the Bank stood in the relation of principal and surety ; and, therefore, he, as surety, was obliged to permit the Bank to have the use of any security he might have or acquire, and the Bank was obliged to assign to him any additional security they might get : the duty between them as principal and surety, being reciprocal, and each being obliged, according to a rule of equity, to afford the other any security, either personal or on property, collateral or direct, which might be acquired for the payment of the debt.

By our understanding of *Gomez's* engagement, he voluntarily, at the request of *Levy*, put his name on the paper, and became bound to pay the Bank, in exoneration and discharge of *Clark*, both at law and in equity, and thus, by his written undertaking, came in the place of the principal debtor to the Bank and to *Clark*, who was not a co-surety with him, but supplemental only. This is indisputable at law, nor does the mere fact that he was a volunteer, and *accepted* for the accommodation of *Levy*, alter the case in equity. Had there been a treaty between *Gomez* and *Clark*, or had they both signed the negotiable paper for the accommodation of *Levy*, without treaty, before it was was offered for discount, and negotiated, there might have been some ground, as they were both sureties for *Levy*, to consider them co-sureties in Equity. But as they were bound for different acts, it is submitted that even upon this state of the proof, *Clark* must have been in equity a supplemental surety only, and not a co-surety of *Gomez*. Nothing else than evidence *aliunde*, that in fact they had agreed to be reciprocally responsible to each other, notwithstanding the form of the instrument chosen, could make them in equity or law co-sureties. In the present case, there is no such evidence. The bill was negotiated in *Clark's* name, and the Bank afterwards procured the acceptance of *Gomez*, for their own benefit, and, by inference of law, for that of *Clark*, who ceased to be the primary surety to the Bank, and became secondary and supplemental only :

the acceptor being, as to him, the principal debtor. If the bill had been protested for non-acceptance, and the Bank had sued *Levy*, and held him to bail, and fixed the bail with the payment of their judgment, and then collected the money of *Clark*, he would have had a right to resort to the bail, and the Bank must have assigned to him their judgment against the bail; because the bail comes in the place of *Levy*, the principal debtor. *So does the acceptor*, *Gomez.*—(11 *Vesey junior*, 22.—*Parsons* v. *Pridock*,) (2 *Vernon*, 608.) The case of *Tentrum* v. *Powell*, (5*th Taunton* 192) shews that the acceptor is principal as to all the parties and that even if he accepts *for accommodation*, and not upon funds, that he will not be considered, *as to the holder*, a surety.

Such were the rights of the parties at the execution of the deed of trust. In this case it is not material to consider whether the trustees were affected with notice or not, for *Clark* is a *cestui que trust* in the deed of November, 1819, and he is a party to this suit, and the Plaintiff avers, (as the truth is,) that *Clark* is a party, to the trust deed, and rests his claim to relief upon *Clark's* right under it. Whatever rights, therefore, he is supposed to have under his mortgages of April and of July, 1819, he must be content to have them as they are qualified and restrained by the deed of November,1819,to which he is a party. By the former deeds of mortgage, *Clark* was counter-secured as to all the endorsements *then made, or to be made;* by the deed of trust he was declared to have a lien upon the property therein conveyed, and the trustees were directed to indemnify him, by paying so much of *Levy's* debt at the Banks (who are parties to the deed,) as was (then) endorsed by *Clark*. Now, whether the deeds of mortgage were void, as against the deed of trust, or good in equity against it, yet by *this* deed, by the very words inserted for *Clark's* benefit, his power to enter into any new security is annulled, and the property mortgaged to him by his consent, conveyed to others, subject to such endorsements of his as were then in Bank.

Now, not waiving, but insisting that under the deeds of mortgage and trust, *Clark* was protected against *endorsements* only, and not against any other form of suretyship—yet if it be correct, according to the former part of this argument, that upon the bills accepted by *Gomez*, he was liable primarily, and *Clark* only secondarily, and in aid of him, in November, 1819, when the deed of trust was executed; then after that date, the trustees in the deed were bound only to protect *Clark*, according to his liabilities, as they then existed, and not otherwise. If he was secondarily liable, they were bound to protect him, not by paying the debt, but by causing *Gomez* to pay it, or by paying it themselves. If they paid it, they could claim an assignment of the rights of the Bank, against *Gomez*. *Clark*, by no act of his after November, 1819, either in collusion with *Gomez*, or without it, could make the trust fund primarily liable, where it was before that time, liable only in the second degree.—Therefore his note of February, 1820, whereby he has become the co-surety of *Gomez*, cannot have that effect, and if *Gomez* has paid off this note, whatever may be his rights against *Clark* personally, yet neither he nor *Clark* can bind the trustees to a new, and different obligation from that imposed upon them by the deed of November, 1819. The rights of all parties are ascertained and fixed by that deed, and as respects *Clark's* liability on that deed, it was secondary, and not primary, by endorsement, and not by making a note. *Clark* has no claim for damages, he has sustained by entering into a new security, and into an engagement different from that by which he was bound in November, 1819, and from which only, the trustees by the deed of that date, were required to save him harmless. *Clark's* claim certainly derives no additional force when urged by the Plaintiff, as there can be no reason assigned wherefore *Clark* should have changed his responsibility from endorser to that of co-surety, unless he thereby hoped and intended to give the Plaintiff an undue preference over the other sureties of *Levy* for his accommodation, and who by their diligence, had acquired a lien on *Levy's* property subject only to the responsibility of *Clark*, and not of *Gomez*. The deed must be construed as a counter-security for *Clark*, for suretyships antecedent to the deed. For if he were at liberty to join *Levy* in new securities without limits, he could pledge the trust property to its value, and the trust deed would be nugatory as to *Lazarus*, and the other *cestui que trusts* named, and would enure exclusively for the benefit of *Clark*, which is manifestly against the intention of *Levy*.

Henderson, Judge.—*Levy* and *Clark* stand bound, in equal degree to the Bank, that *Gomez* should accept and pay the bill of the former. The discount, being solely for the benefit of *Levy*, as between him and *Clark*, he was the principal debtor. *Gomez*, by his acceptance, became a principal debtor as to *Clark* and the Bank; but his acceptance being for the accommodation of *Levy*, as between *Levy* and himself, he was only a surety. These facts were all known to *Clark*, at the time of his endorsement, with the further information, that *Gomez* accepted, or would accept, in confidence that *Levy* would consign property to him before the maturity of the bill, to meet the acceptance; and that he, *Gomez*, transacted business as a Commission Merchant in New York, to whom *Levy* was in the habit of making large consignments.—By a bond and mortgage, a fund is provided for the indemnity of *Clark*, at the time of his endorsement. The whole of *Levy's* property is afterwards *bona fide*, and upon full consideration, conveyed to *Lazarus* and *McRae*, with notice of the mortgage to *Clark*. The mortgage has not been registered. In the deed to *Lazarus* and *McRae* there is this clause: "And whereas *John Clark* hath a lien on part of the property herein conveyed, for his endorsement made for the said *Jacob Levy*, it is further understood, agreed, covenanted and granted, and the said trustees are hereby directed, in order to extinguish said claim, first fully to pay and satisfy, out of the proceeds of the sale or sales aforesaid, so much of the debt of the said *Jacob* with the Banks aforesaid, (meaning among others the Bank of Cape-Fear,) as may be endorsed by the said *John Clark*." After one or more redrawings by *Levy* on *Gomez*, endorsed by *Clark*, and after the execution of the deed from *Levy* to *Lazarus* and *McRae*, *Levy*, with *Gomez* and *Clark* as his sureties, gave a joint note to the Bank of Cape-Fear, the holder of the bill, or which is the same thing, a similar one drawn in renewal of it, including interest and damages. *Levy* and *Clark* being insolvent, *Gomez* has paid the whole of this note. In the mortgage to *Clark*, the mortgaged property is declared to be liable to any future, or other endorsement, which *Clark* may make for *Levy*, and for any endorsement which he may make for their renewals, according to the practice of Banks. *Gomez*, by this bill, seeks the benefit of the fund created for *Clark's* indemnity, and has obtained an assignment from him, and also one from the Bank of Cape-Fear, of all their interest in the trust premises, for and on account of the bill or note above-mentioned.

There is no *agreement* made between *Clark* and *Gomez* to change the order of their liability, appearing upon the face of the transaction. Upon it, *Gomez* stands prior in obligation to *Clark*, for *Clark's* liability was to arise only upon his default. Standing in this relation, he cannot call upon *Clark* to contribute as a co-surety. In order the better to understand the claim of *Gomez* to the fund provided for the indemnity of *Clark*, we will consider it as created by a stranger, and not by *Levy*, the principal debtor. *Gomez* could not reach it on the ground of equality between *Clark* and himself, for he stands, as we have seen, prior in obligation to *Clark.* Neither can he claim this fund upon being subrogated to the rights of the creditor, the Bank of Cape-Fear ; for the Bank, upon receiving payment from him, is bound to assign all its obligations and facilities for enforcing payment from those who stand prior and equal in obligation to him, not from those who stand posterior to him ; and, I would say, not from those who stand in equal or prior degree, unless the fund came from the principal debtor. For I think, in that case, it is purely personal, and cannot be communicated. But as this fund came from *Levy*, the principal debtor, it is very justly thought to be more accessible to his sureties, and if it still remained the property of the principal debtor, this Court would lend its aid to reach it, and would remove all obstructions out of the way, and place it within the power of the suffering surety. I am almost prepared to say, that where the principal debtor creates a fund for the indemnity of a primary surety, one not a bare certificator, as he is called in the civil law, (such I think *Clark* to be) any surety who stands in equal or posterior degree, may pursue the fund in the hands of any person, who comes to it with notice. For the principal debtor is bound to provide equally for all his sureties with him there is no prior or posterior ; and when he communicates a benefit to one, his relationship makes it common to all standing in equal degree. *Commune periculum, una salus.*

The co-surety who attempts, at the time, or after the obligation is created, privately to provide for himself, from the funds of the common principal, acts contrary to good faith, as he thereby diminishes the funds, on which they all rely for their common safety. And besides, it would tend to weaken his exertions to the end in which all have an interest. But to extend this to a prior against a posterior surety, is connecting together those whose situations are different, and nferring similar rights from dissimilar obligations. It is restricting too much that right of self-preference or self-security, which all human laws permit, if we do not infringe upon those of others; and it is not considered an infringement of them, to procure for ourselves a satisfaction or security for our debts, although we may leave our debtor without the means of satisfying his other creditors, whose debts may be as meritorious as our own. Subjecting this fund (I speak of it as provided for *Clark's* indemnity, and not for the payment of the debt, which I shall notice presently,) to the claim of *Gomez*, would be saying, in *effect*, that the bare act of becoming surety creates a *lien* in behalf of the surety, upon the property of the principal debtor. It cannot be reached through the medium of *Clark*, for it was to be used by him, only in the reverse of the facts which have happened to wit: the failure of *Gomez* to pay; whereby *Clark's* guarantee to the Bank would be violated. Nor can it be reached through the medium of the Bank, for similar reasons. The Bank could not call on *Clark*, and consequently could not call for the fund provided for him, but in the like event, the failure of *Gomez*. The fund, therefore, remained the property of *Levy*, and subject to be transferred to any person, liable, however, in the hands of an assignee, to indemnify *Clark*, or any person who had recourse against him, for any damage which they might sustain from the default of *Gomez*. I have viewed this case, as it stood to the fund, when the trust deed was executed to *Lazarus* and *McRae*. After which *Levy's* dominion over the property entirely ceased, and with it the efficacy of that part of the original mortgage to *Clark*, to secure him against future endorsements; for it rested in agreement, and grew out of his dominion over his property. The loss of dominion did not affect endorsements made afterwards, for prior debts. Considering this, therefore, as a fund set apart for the indemnity of *Clark*, *Gomez* can have no claim to it.

But it is said that it is set apart not only for the indemnity of *Clark*, *but that it is specifically appropriated to the payment of this debt.* If so, most certainly he who pays the debt has, in this Court, a right to be reimbursed out of the fund. For the principal debtor substituted it for himself, and he who can claim remuneration from him, can claim it from the fund. They are as it were identified. But after much reflection, and some doubts upon the subject, I think that the fund was provided and set apart for the indemnity of *Clark* only, and not for the payment of the debt, otherwise than as a mean of saving *Clark* harmless from his endorsement, because from the recitals in the deed providing it, it appears that it is substituted for the unregistered mortgage and bond to *Clark*, which provided for his personal indemnity only, and not for the payment of the debt. And the words "extinguish such claim," and "fully to pay so much of the debt of said *Jacob Levy* with said Banks, as may be endorsed by the said *Clark*," must be understood as directed in reference to that object, to wit: the payment of that debt, should *Clark* be compelled to pay it, and not simply the payment of the debt, without regard to that object. This construction is much strengthened from the fact, that personal indemnity, and not the payment of the debts generally of *Levy*, was the object of the deed. From the operation of it, it is therefore fair to strike out (or rather not to include within it) such debts as the person intended to be secured, should not be compelled to pay. As to the ground, that it was intended to protect *Gomez* as well as *Clark*, and that it was left out of the deed by inadvertence or mistake, the evidence does not support the charge. It does not appear that the parties intended any thing but what they have done.

Hall, Judge.—If *Gomez* and Clark had agreed to become sureties for *Levy*, and with that view, *Clark* had endorsed, and *Gomez* had accepted the bill of exchange, when they afterwards give the note, on which a recovery was had against *Gomez* in New York, I think they should be considered as sureties for the debt which that note was given to discharge, and consequently that any indemnity which had been taken by *Clark*, to secure him against loss, should extend to *Gomez*.

But if *Gomez*, without any agreement or understanding with *Clark* to become *Levy's* surety, accepted the bill of exchange, he thereby became debtor to the Bank, and *Clark* was only bound as endorser. It followed that if *Gomez* had paid the debt, *Clark* was discharged, for he was only bound to pay, if *Gomez* did not.

Afterwards, when *Clark* and *Gomez* signed the note of *Levy* as sureties, *Gomez* was thereby released from his liability as acceptor, and stood as a co-surety with *Clark*, and as the latter had secured himself against loss, by the mortgage which *Levy* had made to him, *Gomez* had a right to be indemnified from the same security. This would be the case, if the rights of other persons did not interfere.

When *Clark* stood as endorser on the last bill of exchange, the deed of trust was executed to *McRae* and *Lazarus*, for the same property which *Levy* had mortgaged to *Clark*; so that *Clark* could only expect to be indemnified for such endorsements, as he had made for *Levy*, but not for any liabilities which he might incur *after that time*. I have no idea that it was intended, nor do I think that the terms of the deed justify the belief, that the parties to it, intended to secure the payment of the *debt* due upon the bill of exchange, on which *Clark* was endorser, but only intended to secure *Clark* against his endorsement. If there had been a new bill of exchange drawn, perhaps the liability of the parties would not be altered. But when the note was given, they were so far altered, that *Clark* became a principal to the Bank with *Gomez*, and the liability of *Gomez* as acceptor, was discharged. In this respect, *Clark* acted upon his own responsibility, and of course could not expect to be remunerated from *Levy's* mortgage to him, in case he had been compelled to discharge that note. His lien upon that mortgage for future endorsements, was terminated by *Levy's* deed to *McRae* and *Lazarus ;* of course he could not, by his assignment of the mortgage to *Gomez*, convey any right which he himself did not possess.

I think, as it does not appear that *Clark* and *Gomez*, by any agreement or understanding between them, stood as co-sureties for *Levy* on the bills of exchange ; that although the mortgage from *Levy* to *Clark* secured the latter, on any endorsements he had made, or liabilities he had incurred for *Levy*, before the date of the deed of trust to *McRae* and *Lazarus*, it became inoperative, after the creation of that trust, as to any endorsements, made by *Clark* after its date. This deed was executed with *Clark's* knowledge ; it was after its existence, that he executed the note with *Gomez*, as co-surety for *Levy*. For so doing, he cannot be indemnified by the mortgage, and of course can communicate to *Gomez* no right arising from the same instrument. For these reasons, I think the bill should be dismissed.

Per Curiam.—Let the bill be dismissed with costs.

Christian L. Benzein, et al.
v. } From
William Lenoir, et al.

A trust being an incident of the legal estate in the land, is of necessity destroyed or suspended by whatever destroys or suspends the legal estate. Therefore, the lord by escheat, the abator, intruder, disseisor, &c., are not subject to a trust.

Where a grant is obtained, with knowledge of the fact that the land has been before granted, such grant is void, and will be vacated in equity. Where this state of facts appears, the Court will act, although the party entitled to relief is made Defendant with the fraudulent grantee—especially where the bill was filed many years ago, when our equity system was imperfect, and the practice little understood.

Where such fraudulent grant has been recently obtained, the Court will entertain a bill to vacate, upon the ground of *quia timet; a fortiori*, where possession has been had under it so as to bar or cloud the title at law, and will not only vacate the grant, but direct a re-conveyance.

It is no defence that the fraud was not intended for the person upon whom it has taken effect; for if fraud exists, the party practising it shall not be protected against any who are injured.

An equity of redemption is not a trust, but is a right inherent in the land, and charges all who take the land, although coming in in the post, and by title paramount.

The doctrine laid down in *Campbell* v. *MacArthur*, (*N. C. T. R.* 115,) recognised as law.

This cause, which has in its various stages been frequently before the Court, (*vide Conference, Reports,* 217.—1 *Law Rep.* 504,) was argued at last term, upon the order for re-hearing, made by Badger, Judge, on the Autumn Circuit of 1824, (4 *Hawks*, 403.)

The bill was filed before the year 1800, and subsequently amended; from the length of time which has elapsed since the commencement of the suit, many changes have taken place in the parties, which it is unnecessary to notice, as the cause turned solely upon the questions presented by the original and amended bill. It was filed by the Plaintiffs, styling themselves "members of the *Unitas Fratrum*, on behalf of themselves and all the other members of the said *Unitas Fratrum*." They averred, that on the 12th day of November, A. D. 1754, *Earl Granville* granted to *Henry Cossart*, agent of, and trustee for, the *Unitas Fratrum*, two tracts of land in Wilkes County; that *Henry Cossart* died before the 4th day of July, A. D. 1776, leaving *Christian Frederick Cossart*, of the kingdom of Great Britain, his heir at law. That *Christian F. Cossart*, with a view to a sale of the said land, in the year 1772, appointed one *Frederick William Marshall* his attorney, with a power of substitution.—That *Frederick W. Marshall*, in pursuance of this power, appointed *John Michael Graff* his substitute, who on the 22d day of July, A. D. 1778, sold the said lands to one *Hugh Montgomery* now deceased, for 6,250 dollars; that *Montgomery* paid 2,500 dollars of the purchase money, and on the next day, July 23d, for the purpose of securing the balance, demised the lands to *Graff* for the term of five hundred years, with a proviso for redemption; that *Graff*, the mortgagee, held the legal title of the term in trust for the *Unitas Fratrum*, and upon his death it vested in *Fragott Bagge* his Administrator, who, well knowing the trusts upon which his intestate held the same, assigned it to *Frederick William Marshall*, the agent of, and trustee for, the *Unitas Fratrum*, who by his will dated December, A. D. 1801, devised it to the Plaintiff *Benzein*, who was also one of his executors, by whom the will was proved in this state. That in all the above recited transactions, *Henry Cossart*, *Christian F. Cossart*, *Frederick W. Marshall* and *John M. Graff*, admitted themselves to be trustees for the *Unitas Fratrum*, an ancient Episcopal Church, recognized as such by an act of Parliament, 22d *Geo.* 2, and that the name of *Henry Cossart* was used for no other reason, but because the legal title to the land was supposed to be vested in him, and that *Montgomery* in his will recognised the balance of the purchase money for the said land as a debt due by him to the *Unitas Fratrum*, and charged his residuary estate with the payment of it. That *Montgomery* in his life time conveyed the said lands to several persons, of whom *John Brown* was the only survivor, in trust for his two infant children, that he appointed the same persons executors of his will, and that he in his life time, and his executors and trustees since his death, had held possession of a part of the said land. The bill then averred that the Defendant *Lenoir*, and other persons claiming under him, who were also Defendants, pretending that the land was subject to entry, had obtained grants for part of it.

The Plaintiffs insisted that the grants, if any had been obtained, issued since the year 1777, and were not warranted by any law for opening the land-office. That if the land had been entered as confiscated, the grants were void and inoperative, and if they were not void, that the state held the land if it had been confiscated, as a trust to secure the debt due to the *Unitas Fratrum*, and that it was still subject to this trust in the hands of the Defendants, who they averred had notice of it at the time they obtained their grants. The Plaintiffs denied that the land was within the several confiscation acts, and in support of this position, relied upon the act of 1782, entitled " an act to vest in *Frederick William Marshall, Esq.* of Salem, in Surry County, the lands of the *Unitas Fratrum* in this state, for the use of the said *Unitas Fratrum* and other purposes." The bill also alleged that there were defects in some of the instruments of transfer from *Cossart* to *Montgomery*, and sought to have the same corrected.

The executors and trustees under *Montgomery's* will, as well as the persons who claimed under grants from the state, were made Defendants. The Plaintiffs prayed a discovery of the title claimed by the Defendants who were grantees, and that they might be decreed to be trustees for the infant children of *Montgomery*, and compelled to convey their titles and deliver up possession to his surviving trustee, and that the Plaintiffs might have satisfaction of the debt due to the *Unitas Fratrum.*

John Brown, the surviving executor and trustee of *Montgomery*, in his answer admitted all the allegations of the bill, stated that he had brought an action at law to recover possession of the land, in which he failed. He denied his obligation to pay interest on the mortgage debt, because he had never been put in possession, and submitted to pay the balance whenever this was done.

The Defendant *Lenoir*, in his answer, admitted that he had on the 22d of May, A. D. 1779, the 24th day of September, of the same year, and on the 1st day of March, A. D. 1780, obtained four grants for land which was within the boundaries of the land mentioned in the bill; that these grants were founded on several occupancies, some of them as old as the year 1765. He averred that he had been in actual possession and occupation of all the lands included within his grants ever since their date, claiming the same, adverse to the title of any person whatsoever; and prayed the benefit of the act of 1715, entitled "an act concerning old titles of land, and for limitation of action, and for avoiding suits in law." He denied that *Henry Cossart* held the land mentioned in the bill in trust for the *Unitas Fratrum*, and insisted that he held it for himself. He denied having any notice, before the date of his grants, of the title of *Cossart*, or of the trust claimed by the Plaintiffs to exist for the *Unitas Fratrum*, but admitted that before that time "he had heard that the Moravians set up some claim to two tracts of land, which were supposed to include the four several tracts herein mentioned as claimed by him, but it was nothing more than a vague report, often contradicted by persons who said they had asked the Moravians about it, and that they disclaimed having any title to them, but that he never had any information on the premises to induce him to believe that the *Unitas Fratrum* had any just claims to the land mentioned in the bill."

There were twenty other Defendants. The titles of those who did not disclaim were, in all important particulars similar to that of *Lenoir*. The grants they had obtained were all dated since the year 1754, and they admitted the same notice, and relied upon the same defence.

The deeds of *Lord Granville* to *Henry Cossart*, the power from *Christian F. Cossart* to *Frederick W. Marshall*, the deed of substitution from *Marshall* to *Graff*, the conveyance by *Graff* to *Montgomery*, and the mortgage made by the latter, the assignment by *Bagge* to *Marshall*, as well as his will and that of *Montgomery*, and a great variety of other documents were filed as exhibits to the bill. An abstract of those above mentioned only is thought to be material.

The deeds of the *Earl of Granville* to *Henry Cossart*, dated the 12th of November, A. D. 1754, were indentures "made between the *Right Honorable John Earl, of Granville, &c.* and *Henry Cossart de St. Aubin, Agent of the Unitas Fratrum.*" The limitation was "to the said *Henry Cossart*, his heirs and assigns forever." The covenants for the payment of the quit-rents were, that "the said *Henry Cossart de St. Aubin*, his heirs and assigns shall, &c." There was no declaration of trust for the *Unitas Fratrum*, neither was their name mentioned in the deeds, except in the manner above set forth. The return of the surveys, however, stated them to have been made "for the Lord Advocate, the Chancellor and Agent of the *Unitas Fratrum.*" The power of attorney from *Christian F. Cossart* to *Frederick W. Marshall* recited, that "for the end, intent and purpose that all and singular the fee simple, inheritance and full property of all my messuages, lands, plantations and hereditaments now belonging to me the said *C. F. Cossart*, situate, lying and being in the province of North Carolina, may be sold, &c.

the said *F. W. Marshall*, of Salem, in Wacovia, (the name of the Moravian settlement) in the said province of North Carolina," was authorised to sell and dispose of the same, and he was directed "to remit and consign the proceeds to me, the said *C. F. Cossart*, or otherwise to my executors, administrators or assigns." No mention whatever was made in it of the *Unitas Fratrum*.

The substitution of *Graff* for *Marshall* followed the words of the original power, and in no way upon its face did it appear that *Graff* was the agent or trustree of the *Unitas Fratrum*, whose name was not inserted in the deed. The same was the case with respect to the deed made under this power by *Graff* to *Montgomery*, and of the reconveyance to *Graff* in mortgage, and the articles in execution of which the deed was delivered, recited that the land was the property of *C. F. Cossart*.

The assignment by *Bagge* to *Marshall* recited the power from *C. F. Cossart* to *Marshall*, the substitution of *Graff*, the sale to *Montgomery*, and the mortgage by the latter to *Graff*, but contained no allusion to the interest of the *Unitas Fratrum*.

F. W. Marshall, by his will, recited, that "whereas it is incumbent on me to see that sacred trust imposed in me by the people known by the name of the *Unitas Fratrum*, with respect to all the land which I have and hold for them, in the State of North Carolina, settled and established, &c."— The will then recited the conveyance by *Earl Granville*, on the 7th of August, A.D. 1753, of 98,985 acres of land, known as Wacovia, to *James Hutton*, Secretary of the *Unitas Fratrum*, and a declaration of the same date by *Hutton*, that he held the whole of the 98,985 acres of land in trust, for the use and benefit of the *Unitas Fratrum*, and declared the trusts upon which great quantities of land in Pennsylvania and New Jersey, as well as in North Carolina were held, and devised the whole thereof to the Plaintiff *Benzein*, in fee simple, in trust that the devisee and his heirs "would maintain the said United Brethren in possession of the said tracts and parcels of land." And as to the lands in dispute, the will declared that they were originally "conveyed by the late *Earl Granville* to *Henry Cossart*, Agent of the *Unitas Fratrum*, in trust for the same. The legal estate was afterwards by virtue of a power of attorney conveyed by me, or which is the same, by my attorney, *John M. Graff*, to *Hugh Montgomery*. And whereas the said *Hugh Montgomery* did mortgage the same lands to said *John M. Graff*, for the balance of purchase money, and *Fragott Bagge*, Administrator of the said *John M. Graff*, assigned the said mortgage to me, I do therefore hereby devise all my right, &c., in and to the said lands, to the said *Christian L. Benzein*, his heirs and assigns, in trust, as aforesaid."

Montgomery, by his will, which was proved in the year 1780, after several specific bequests, charged all the remainder of his estate with the payment of his debts, and "especially with a just debt in specie, which I owe to the Moravians at Salem, and I do in a particular manner, order and direct my said executors to satisfy and discharge such Moravian debt, in gold or silver, according to equity and good conscience, and for that purpose to sell and dispose of so much of my said residuary estate for gold or silver, as shall fully satisfy that debt."

Replications were taken to the several answers, but the Plaintiffs, by an instrument filed as an exhibit, admitted that the Defendants had been in possession of the land claimed by them, in the manner set forth in their answers.

The depositions filed, were exceedingly voluminous. It is thought, however, that the case may be easily understood without an abstract of them.

A decree for the Plaintiffs was made in 1814, (*vide* 1 *Car. L. Repos*. 504,) and the object of the petition was to reverse that decree.

Badger, in support of the petition—

I. No valid trust has been shewn.

1. The deed from *Ld. Granville* to *Henry Cossart* does not express any trust. In the premises the grantor is described as Lord President of the Privy Council, and Knight of the Garter, and the grantee is styled agent of the *Unitas Fratrum.* This description occurring in the premises whose proper office it is to specify the parties and the thing intended to be conveyed, cannot be supposed to intimate a trust, and in the *habendum*, where properly the uses and purposes of the conveyance as well as the quantity of estate conveyed ought to be declared, nothing is said of any trust; but the person having been in the premises sufficiently identified, even the term "agent" is omitted, and the limitation is to "*Henry Cossart* and his heirs and assigns." To infer that the *Unitas Fratrum* were concerned in this grant because the grantee is styled their agent, seems not more reasonable than to suppose the Privy Council, or the Knights of the Garter had an interest in the grant, because the grantor is said to be a member of the latter, and the president of the former. The certificate of survey is certainly a very improbable place to find a declaration of the trusts of the grant.—That can only show for whom the survey was made, and if the survey was made for them, it is clear the land was not intended to be granted in trust for them. If *Cossart* took a grant to himself of land surveyed for them, he might on the ground of fraud be constructively a trustee, but no such fraud is alleged. The trust set up in the bill is a direct and proper trust, and is not supported by proof of facts, from which the Court, acting upon the conscience of the party, will by implication, raise a trust. The two species of trust are entirely distinct in their character, and governed by different rules, and the proof of the latter does not sustain an allegation of the former.

If such a trust as the Plaintiffs allege existed, and was recognised by *C. F. Cossart*, why does not an intimation of it appear in the power of attorney to *Marshall*, in the instrument of substitution, in the deed to *Montgomery*, in the articles of sale, or in the deed which raises the mortgage term to *Graff?* In all these instruments, the land is treated as the property of *Cossart* alone, the sale is made for his benefit and the proceeds are directed to be remitted to him or to his assignees. Yet *Marshall* and *Graff* were members of the *Unitas Fratrum*, and *Bagge* the Administrator of *Graff*, in his assignment to *Marshall*, takes no notice of the existence of any interest in the *Unitas Fratrum*.

2. If the deed does not express the trust, parol evidence is not admissible to shew it. The general doctrine that such evidence cannot be received to add to, or alter a written instrument, either at law or in equity, needs no authority for its support. No exception can be shown, which includes the present case, and the general rule is directly applicable to, and decisive of it. (*Roberts on Frauds*, 91—*Kirk* v. *Webb*, *Prec. Ch.* 84.)

The act of 1782, lends no support to the Plaintiffs' case. The purpose of that act, as declared in the preamble, was to vest in *Marshall*, the lands of the *Unitas Fratrum* in this state, and the second section vests in him the Wacovia and other tracts, but not that in question. The inference is that it was not their land.

3. The trust, if any was void, because limited to an indefinite multitude.

In giving a construction to the statute 1 *Rich.* 3, which enables the *cestui que use* to convey the possession without the concurrence of his trustee, the distinction was settled between uses and trusts; the former being general and permanent, and the latter special or transitory. Where the seizin was transferred upon a confidence, that the feoffee would permit the feoffor, or any other person and his heirs to receive the rents and profits, and that the feoffee would make such legal estates as should be directed, this confidence was the use; but where the transfer was to the intent that the feoffee should do some act which required him to have both legal estate and the use, as to convey to a third person, this special confidence, was a personal trust in the feoffee. (*Sanders' Uses and Trusts*, 3d *London edition*, *Ch.* 1, *Sec.* 1. 2.) Upon this *use* the statute 1 *Rich.* 3, operated, enabling *cestui que use* to convey to a third person the legal estate, without the concurrence of the trustee, and upon this use, the statute of uses 27 *Hen.* 8, also operated by transferring to the *cestui que use* himself, the legal estate, without his own concurrence or that of his feoffee ; but the special trust or confidence still remained unaffected by either of the statutes. The species of trust which is the creature of Courts of Equity, and introduced in consequence of the statute of 27 *Henry* 8, is but the secondary use, unexecuted by the statute. Whatever modifications modern trusts have undergone, they are in their origin and nature, nothing but uses upon which 27 *Henry* 8, does not operate. This trust, like the use before the statute, is a general and permanent right to the beneficial enjoyment as owner, of an estate which another is seized at law. The use before, and this trust since the statute of uses, are, so far as this discussion is concerned, the same thing. (*Sand. U. and T. Ch.* 3, *S.* 1—*Cruise Dig. Trust*, *Ch.* 1, *S.* 1, 2, 3.)

It is said by *Ld. Keeper Henly* in the case of *Burgess* and *Wheate*, (1 *Blk. Rep.* 186,) " that uses and trusts are the same, seems adopted by all the great persons who have presided in this Court ;" and in the same case *Ld. Mansfield* says, that " the forum where it is adjudged, is the only difference between trusts and legal estates, and whatever would be the rule of law if it were a legal estate, is applied in equity to a trust estate." Such also was the opinion of *Ld. Hardwicke.* (1 *Atk.* 591.)

In every limitation of uses, it was necessary there should be a person capable of taking the use, and those only were capable who could take the legal estate ; hence a use to the parishioners of a particular place was void. (*Sand.* 1 *Ch. Sec.* 9, *p.* 54, 55.) The rule is the same as to the capacity to take a trust estate. (*Sand. Ch.* 3, *S.* 8.) But a legal estate limited to the *Unitas Fratrum,* would be clearly void—so would a use, and so, by the plainest and most precise analogy, would be a trust.

There is not the least reason to suppose that a trust for the inhabitants of a parish is good, otherwise than as a charitable use within the statute 43 *Eliz.* *Mr. Sanders* does indeed say, in the second edition of his work, at page 67, that a use to a parish though void as a *use*, is good as a *trust*, but the case he cites, was decided upon the statute of *Eliz.* In the 3d edition, which was carefully revised by himself, the position is omitted, and the omission cannot be attributed to accident. He distinctly considers the question, who is capable of taking uses and trusts, as they existed before, and exist since the statute of 27 *Hen.* 8, and could only have left out the passage in question, because in a general sense he thought it untrue, and in its restricted reference to charitable uses, inapplicable to the subject of his treatise. The opinion of this writer is therefore with us, and no authority can be produced except the position laid down by him, and by him subsequently retracted.

It being clear, then, by both authority and analogical reasoning, that a vague trust is void, we are brought to the enquiry, whether the trust now in question is excepted from the operation of the rule as a charitable use. On this point I refer to the argument made at December Term last, upon *Griffin's* will,* only adding, that the case of the *Baptist Association* v. *Hart's Ex'r.* then cited, is a conclusive authority to show, that the trust here is void. There, the limitation was in trust for the " Baptist Association which for ordinary meets at Philadelphia, and is, to say the least, as certain as a trust for the *Unitas Fratrum,* a religious society whose members are scattered over Europe, America, and the remotest parts of the world.

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* To be hereafter reported.

But the Act of Parliament recognising the *Unitas Fratrum* as an ancient Episcopal Church, has been, and may be relied upon, as giving them a capacity to take. It is not pretended that the act incorporates them, or expressly confers upon them any new faculties or powers, and the only question which can be made is, whether the bare recognition of an existing unincorporated society confers a capacity to take and hold property. It is evident it does not. The law of England recognises Counties and foreign States, yet they are incapable of taking any estate, legal or equitable. Parishes are recognised, yet we have seen that a use limited to a parish is void. Churchwardens are officers whose existence is recognised, and their authority declared by many Acts of Parliament; they are, to some purposes, a corporation, have succession in law, can hold goods and chattels, and bring actions as churchwardens. (2 *Hen. Bl.* 559.—1 *Bl. Com.* 394.—*Com. Dig. Eglise, F.* 3.) Yet a devise of real estate to them is void. (*Wright* v. *Row*—1 *Brown C. R.* 61, *in notes.*) For what reason? Because they are not a corporation as to lands. (*Com Dig. Eglise, F.* 3.) Is the *Unitas Fratrum* on higher grounds than the Church of England itself? That Church, established, endowed and protected by law, has been recognised by innumerable Acts of Parliament, from *Magna Charta* to the present day, and yet in its aggregate, the Church of England is incapable of taking any estate. (*Town of Pawlet* v. *Clark*—9 *Cranch*, 325, 326.)

But if recognition will confer corporate powers, why not the power of taking the legal estate? How is its efficacy limited to trust estates? The great purpose of incorporation, is to give succession in law to a body whose members, by natural causes, are constantly changing. (1 *Bl. Com.* 494.) If such powers exist, in whom are they vested? Where is the succession, and in whom is the power to sue, to act, and to bind the whole body of the *Unitas Fratrum?* Is it in the members who reside in Europe, in Asia, or in

America ? If the trust in question is valid, the most arbitrary, capricious and indefinite limitations cannot be pronounced too vague for judicial support.

II. If there was a trust declared upon the legal estate of *H. Cossart*, and that trust was valid, then upon *Cossart's* death, before 1776, the legal estate descended upon his heir at law. If either remained in him, or was conveyed to *Montgomery*, and if so, there was a clear remedy at law, and consequently none in this Court ; or the land vested in the State, by the effect of the Revolution, or the confiscation laws, and, if so, the State held exempt from the trust, and so granted to us, before the act of 1782.

1. Supposing the estate in *Cossart* or his assigns, there was a clear remedy at law, which subsisted at the filing of the bill, unless barred by legal impediments, and no argument can be required to show, that in such case, equity cannot intetrere. If this case is within any exception to the general rule, it ought to be shewn by our opponents. If defects in the instruments of transfer, be relied upon to give jurisdiction, we say, first, no such defect exists : secondly, if there be any, the estate is left in him who made the defective instrument, and he was competent to assert the right at law : thirdly, if such defect gives jurisdiction, it is only against the trustee, and those who represent him, in favor of those interested in having the estate transferred, and not against those who claim adversely to both ; and lastly, if jurisdiction can be assumed against us, it can only be to supply the defect, in order to enable the party to proceed at law, and not for relief here upon a subject matter cognizable at law.

2. Supposing the legal title in the State, it was held discharged of the trust, as will appear from considering the nature of that interest.

To the very existence of a *use*, before the 27 *H.* 8, were necessary, a person capable of standing seized to the use, privity of estate, and confidence of person—for a use was a trust or confidence, which was not the issuing out of *land*, but was a thing collateral, annexed in privity to the *estate* and to the *person*. Hence it followed that whenever either of these essential requisites failed, the *use*, which could not subsist a moment without them, was, of necessity, either suspended or destroyed. For want of privity of *estate*, the lord by escheat, and the lord who entered for mortmain, held discharged of the use. So of the disseisor, abator or intruder, for they were of a different estate. (*Sanders, Ch.* 1, *Sec.* 9.)

So were a tenant for life, remained in fee to the use of another, makes a feoffment in fee, the feoffee, though he hath notice, cannot stand seized to the *use*, for that is annexed to one *estate*, and he is of another. (1 *Rep*. 122 *b. Sand. Ch.* 1, *Sec.* 9, *p.* 53.)

In like manner, where confidence in the person did not exist, though there was privity of estate, the use failed—as where feoffee to uses for valuable consideration, and without notice enfeoffed another. (*Ibid.*)

The king by reason of the dignity of his person, could not stand seized to use, nor the queen, nor could a corporation—therefore, if lands were conveyed to the king and a subject for a term of their lives to certain uses, such uses were void as to moiety of the lands. (*Sand. Ch. Sec.* 9, *p.* 53.)

The reason of these cases is very evident, if we keep in mind that the use is annexed to an *estate*, and cannot be supposed to exist without it—is not an interest in the *land*, or issuing out of the *land*. That which depends upon the *estate* in the land must be destroyed by whatever destroys the estate; while that which attaches upon the land itself, cannot be affected by the destruction of the estate, on which it does not depend. This doctrine is stated, and the diversity well illustrated, in 1 *Reports*, 122 *b*.

In what respect does a trust differ from a use, so that it can subsist after the destruction of the legal estate created to support it? The very definition of a trust shews that it is collateral, annexed in privity to the *estate*, and not issuing out of the *land*. (1 *Wm. Bl. R.* 160. *Cruise, Trust, Ch.* 1, *Sec.* 1, 2, 3, *Sand.* 214.) *Mr. Sanders* has indeed said, (*p.* 277,) that a trust will attach upon the land, but the case of *Moggridge* v. *Thacknell*, (3 *Bro. Ch. Rep.* 517,) which he cites, supports no such position. The case is a very simple one: a devise of personal estate to charitable uses, and the devisee dying in the life of the testator, it was held that the trust should not fail for want of a trustee. The subject of the devise was personalty, and therefore the case is not analagous to ours; but if it had been land, the decision does not effect a single position laid down in this argument. The *estate* of the testator was subsisting in his heir at law, and upon that estate a trust was declared. It is therefore highly probable the expression does not convey the meaning of the writer, and if it does, his own work sufficiently refutes it. If the trust attaches upon the land, it will charge even a purchaser without notice, and will follow the land into whatever hands it may come, like charges for equality of partition and other incumbrances; but the distinction between them is clear and decisive.—(1 *Rep.* 122 *b.*)

Mr. Sanders has also said that the King may be a trustee, (*p.* 278,) but the authorities he cites relates only to cases where the same estate on which the trust was declared, is vested in the King. In one of them (*Penn* v. *Baltimore*, 1 *Vesey*, 443,) the Duke of York, who was trustee for *Penn*, afterwards ascended the throne, and the Chancellor inclined he might be a royal trustee, but gave no decided opinion—and even the inclination of his mind was produced by the special circumstances of the case. It is not intimated, that land vesting in the King in his sovereign capacity, by title paramount, could be charged with a trust. Upon principle, therefore, it must be held that whatever destroys the estate of the trustee, destroys the trust also.

In opposition to this reasoning, may be urged what is reported to have been said in *Geary* v. *Bearcroft*, *Carter* 67,) as stated by *Mr. Sanders*, (*p*. 279,) " if a man conveys lands in trust, and the trustee commit felony, these lands shall be forfeited, though he may have relief in equity," to which *Sanders* subjoins, " it is the same if the trustee commit treason, for as *cestui que trust* forfeits his estate for treason, it is not consonant to justice, that the trustee should forfeit for the same offence." Now, it is clear, that *cestui que trust* does not forfeit the trust estate for felony. (*Attorney-Gen.* v. *Sands*, 3 *Rep. in Ch.* 6, 7—*Cruise*, *Trust*, *Ch.* 2, *S.* 27, 28,) and therefore the doctrine in *Carter* is not law; for forfeiture is annexed to the estate by the tenure, and if a conveyance to trustees will protect the estate from that consequence, both for the felony of trustee and *cestui que trust*, the lord may be deprived of his right, and estates disencumbered of an essential incident, by a mere contrivance of the tenant. The observation of the Master of the Rolls in *Eales* v. *England*. (*Prec. Ch.* 200,) " that if the trustee die without heir, the lord by escheat will have the land at law, yet subject to the trust in equity," and the observation of *Ld. Mansfield* in *Burgess* v. *Wheate*, may also be urged against us. Now, the point decided in the last case, is a complete answer to the dictum of the Master of the Rolls. It was there held, that upon the death of *cestui que trust* without heirs, the trust was expired, and did not escheat, and therefore that the trustee held discharged of the trust. If then the lord is subject to the trust, where the trustee dies without heirs, escheat is *substantially* destroyed, although by law incident to the tenure.

But should these observations be relied upon, it is alleged for the Defendants,

1. That they are mere *dicta*, unsupported by authority, contradicting a plain analogy between uses and trusts, and subverting entirely the distinction between incumbrances which affect the *land*, and equities which affect the *estate* only. (*Cruise Escheat, sec.* 41.)

2. The observation in *Eales* v. *England* certainly, and the others probably, refer only to private persons, and do not apply to the sovereign taking *jure coronæ.* (*Cruise, Escheat, sec.* 43.)

3. *Mr. Hargraves'* decided opinion—he declares that *Ld. Bridgman's* own manuscript reports contain no such proposition as that stated in *Carter*, and considers the dictum, in *Prec. Ch.* too loose to command any attention. (1 *Juris. Exer.* 390—*Cruise, Escheat, sec.* 43.)

4. The assertion of *Ld. Macclesfield*, that if a trustee of copyhold die without heir, the lord entitled by escheat is not subject to the trust. (1 *Strange*, 454.)

5. The case of *Stevens* v. *Bailey*, (*Nels.* 107.) One contracted to sell, and before assurance made, died without heirs, on which the land escheated, and the Court held the lord not bound to complete the contract. After the sale, the vendor was a trustee for the vendee, and if the lord is subject to a trust in equity, he was bound to convey. (*Cruise, Escheat, Sec.* 44.)

6. The statutes 39 and 40, *Geo.* 3, *Ch.* 88, *Sec.* 12 and 47, *Geo.* 3, *Ch.* 24, empowering the King to direct the execution of any trusts, to which escheated property might be liable, at the time of such escheat, and to make grants to trustees for that purpose. For these statutes there could be no reason, if without them, the trust was a subsisting charge upon the lands in his hands, and he was bound to execute it.

7. The opinion of *Mr. Cruise* that the law is with us, and is so considered. (*Digest, Trust, Ch.* 2, *S.* 4—*Escheat, Sec.* 39 *to* 45, *inclusive.*)

It is not at all material in what way the land vested in the State. Escheat is either *per defectum sanguinis*, or *per delictum tenentis*, and the reason of an escheat, in every instance, is the same, viz. : the want of a tenant to perform the services. (*Cruise, Escheat, Sec.* 11, 15.)—Wherever there is none to inherit, the land must revert to the lord, because the estate of the tenant is exhausted.

Upon the whole, it is believed to be fully established, that the *trust* being annexed to the *estate*, and not to the *land*, does not follow the land, but expires with the estate on which it depends, as every incident does with its principal, and as the state did not hold under the trustee, but paramount and in another right, she held discharged of the trust.

The former decree declares, that we are not competent to move these questions with the Plaintiff—that whether there was a trust or not, is a matter to us of no consequence, and concerns only the *Unitus Fratrum* and those deriving title from *Cossart*. Now, who are the Plaintiffs here? The *Unitas Fratrum* alone. What interest do they claim in the subject matter of the suit? None, except as *cestui que trusts*. Lay aside the trust, and they have no more right to institute this suit, than any other man, or society of men in the world; and we may say with confidence, if there be no trust, they have no pretence to move any question at all respecting the land, either with us or any one else. The decree, does then in effect, affirm that a Defendant has no right to question the only interest set up by the Plaintiff, in the subject matter of the suit. Can such a proposition be maintained? Can a suit be properly constituted and judicially determined without any Plaintiff, or what is the same thing, by a Plaintiff who officiously exhibits a bill in which he has no interest, against *all* of those who have the interest?

III. If all these points are against us, we are protected by the statute of limitations.

We had more than seven years' possession, and under a grant which is color of title; and our claim and possession were adverse, both to the Plaintiff and to *Cossart.*

The legal title, whether in *Cossart's* heirs at law, in *Montgomery*, or in *Graff*, could have been asserted at law, and not being asserted, was barred by our color and possession. For reasons unanswerably strong, it has been decided in this Court, that notice makes no difference as to the operation of the statute. (*Reddick* v. *Legget*, 3 *Murph.* 539.)

The former decree seems to exempt this case from the operation of the statute, because of the trust, and our purchase with notice, by which we became trustees, and cannot avail ourselves of the possession against the Plaintiffs. The decree forbids us to dispute the existence of the trust, on the ground that it is immaterial to us whether it exists or not, and assumes its existence as the ground on which we are deprived of a defence, otherwise available for us.

But assuming the trust to exist, is not the reasoning of the Court entirely fallacious? Trusts, as has already been shown, are annexed to the estates in the land, and not to the land itself—and those only are constructively trustees who take from the trustee, either with notice or without value, the estate on which the trust depended. Can an instance be produced, where one who entered upon land adversely to the trustee, was held to be a trustee, while the estate of the trustee was subsisting and capable of being enforced? It may be confidently affirmed that no such case exists. The only principle on which the alienee from the trustee is charged with the trust, (as well as the nature of trusts,) shows that it can have no application to a case of title, claimed adversely to the estate of the trustee. Notice is perfectly immaterial on this subject in equity, as well as at law. (18 *Ves.* 84, 98, 100.)

But if it could be maintained, that we were constructively trustees for the Plaintiffs, still they are barred, for the reasons given by *Sir William Grant*, in his admirable judgment upon the Jamaica Statutes. (*Beckford*, v. *Wade*, 17 *Ves.* 87.)

If we were not trustees for he Plaintiffs, while the legal estate of *Cossart* existed, and was capable of being enforced, did we become such because that legal estate was barred by the statute of limitations? Most clearly we did not; for whatever bars or excludes the legal estate of the trustee, of necessity destroys the trust—so that after that estate is gone, there remains no trust for which any one can be seised. The cases already referred to of escheats, &c., are full to establish this position. But the same doctrine has been decisively settled by many decisions in direct reference to the effect of the statute of limitations. (*Wyche* v. *E. I. Company*, 3 *P. Wms.* 309.—*Lowly* v. *Lowly*, 9 *Mod.* 32.—*Cholmondely* v. *Clinton*, 2 *Merivale*, 362.—7 *Johns. C. R.* 115.—3 *Vesey*, 217.—And the cases referred to have been sanctioned in a recent case by *Lord Manners*. (*Pentland* v. *Stokes*, 2 *Ball and Beatty*, 74.)

A contrary doctrine would produce ruinous consequences, and would subvert the safe and salutary principle on which this Court decided the case of *Reddick* v. *Legget*. That decision, instead of having the effect to quiet titles to land, will only convert him who had seven years' possession, with a colorable title into a trustee, and, instead of giving him protection, will merely change the jurisdiction in which a recovery is to be effected against him.

The case was argued by *Gaston*, for the Plaintiffs, at length. (The Reporter regrets that the arrangements made by him to present the argument of this gentleman to the profession, have wholly failed; he is compelled, therefore, to ask that it may be inferred from the reply of *Mr. Badger*.)

Badger in reply :—

Is the parol evidence admissible to shew the trust ?

The rule at the common law upon the subject of parol evidence, to vary or add to written agreements, was very strict, and an attentive examination of the citations from *Roberts* on the Statute of Frauds, will show that independently of that statute, the evidence is not admissible to prove the trust set up by the Plaintiff. (*Roberts*, 9, 10, 11.—*Hampshire* v. *Pierce*. 2 *Ves, sen*. 216, 1 *Ves. jr*. 241.—*Ld. Cheyney's case*, 5 *Rep*. 68.)

The reason why at common law, a *use* (as to lands) might be declared by parol, was, that the estate passed, not by force of a deed, but by livery of seisin : but wherever, at common law, a deed was necessary to effect the transfer, a deed was also necessary to raise the use. (*Roberts*, 91, 92, 93.)

Resulting trusts are expressly excepted out of the Statute of Frauds. There are two cases of resulting trusts, and one of them is where the deed is made to one, and the purchase-money paid by another. (*Per Lord Hardwick*, 2 *Atk*. 150. How is the state of facts from which the trust results, to be shewn ? We say by writing—certainly not by mere declarations depending for proof on oral testimony. (*Roberts*, 94, 95.—*Kirk* v. *Webb*, *Prec. Ch*. 84.—*Newton* v. *Preston*, *ibid*. 103.)

That the exclusion of parol evidence to shew the declaration of a trust, is not derived from the Statute of Frauds, is evident from the case of personal property, to which that statute does not apply. Where a written transfer or a grant is made, a trust cannot be set up by oral testimony ; because, though the case is not within the statute, yet the general principle of law excludes such testimony, where there is a written instrument. (*Roberts*, 94.—*Fordyce* v. *Willis*, 3 *Bro. C. C*. 577.) In *Mr. Eden's* note on *Fordyce* v. *Willis*, he says, he has " not been able to find an instance of a declaration of trust of personal property, evidenced only by parol, having been carried into execution."

The conclusion from all the cases will be found to support these positions—where to the creation of the legal estate, a writing is necessary, so it is also to declare the trust; where a written transfer is not necessary, yet if it exist, a trust cannot be superadded by parol; and that independently of the statute altogether, a trust cannot be averred, except where, before the statute of uses, a *use* could be averred, which could not be where there was a declaration of the use, a feoffment or bargain and sale.

The utmost relaxation of the rule is found in the case of *Streeter* v. *Jones*, decided in this Court, that *facts* and *circumstances* may be shewn; and even from that decision, the Chief Justice dissented. (3 *Hawks*, 423.)

As to the validity of the trust.

The ordinance of the Convention of 1776, was intended, not to give validity to gifts previously invalid, but only to secure from legislative interference such property as had been well granted before. And the position cited from *Bacon's* Abridgment that "a use to the poor of the parish of Dale is good as a trust," is the same position laid down by *Sanders*, which has been already considered, and does not require to be further discussed. It is very evident that this trust can only be supported as a charitable use, under the statute of 43d *Elizabeth*. The subject of charitable uses, so fully examined in *Bryan* v. *Graham*,* I consider as forbidden ground; but, admitting every thing that was demanded by the defendant's counsel in that case, to be law, it will not help the Plaintiffs here. For in the first place, that statute was intended to protect charities within the realm, but the *Unitas Fratrum*, considered as a religious society, maintain their charities throughout the world. 2d.—Its protection extends to no body of which the Court has not the control.—*Attorney General* v. *City of London, and William and Mary College*, (1 *Ves, jr.* 243, 3 *Bro. C. C.* 171, *S. C.*)

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* To be hereafter reported.

But it has been objected, that the judgment on the demurrer (*Conf. R.* 217,) determines this question, and that the only mode of re-examining that decision, was by a petition to rehear the order. This is a clear mistake as to the practice in equity. After demurrer overruled, Defendant may insist on the same objection by way of plea. (*Mitford*, 176.) So if a plea be overruled, Defendant may by his answer insist on the same matter. (*Mitford*, 248.)

Did the State, supposing her to have taken by escheat or otherwise, hold subject to the trust?

The strict rule as to *uses* required in all cases privity of estate, and the only relaxation of that rule, as applied to trusts, is that wherever the same estate upon which the trust was declared or attempted to be declared, exists, any party having that estate, or any interest carved out of it, though by act of law, shall be in general charged with the trust. Instances of this relaxation are found in the case of tenant by courtesy; and in the two cases cited on the other side from *Ambler*, 552, and 1 *Brown, C. C.* 81, where manifestly the estate still subsisted. In our case, the estate on which the trust was declared, is entirely spent and gone; and the other side must show, in order to support this trust, that a trust is annexed to the land itself, in a strict and proper sense. This has been attempted, but it is conceived it has not been accomplished.

That the terms *land* and *estate* are frequently used to express the same idea by legal writers, is certainly true, and it is as certainly true that their signification is entirely dissimilar—the first denoting the subject, and the latter the interest which one has in that subject.

That *Mr. Sanders* uses the term *land* in the sense of *estate* in the passage cited, will be sufficiently clear by comparing pages 212, 277, 278, and will be manifest by examining page 214, in which he quotes from *Sir Matthew Hale* a clear statement of the diversity between an equity of redemption, as an ancient right inherent in the *land*, and a trust as affecting only the *estate*.

The same remark may be made of *Mr. Cruise's* use of the word land, in title *Trust*, *Ch.* 1, *Sec.* 89, 90, as will be seen by his observations in the three following sections. But in whatever sense he used the word, it is clear he did not mean, that the King taking by escheat, is liable to the trust for that position he expressly disaffirms.—(*Escheat*, *Sec.* 42 *to* 47.)

In *Burgess* v. *Wheate*, *Ld. Mansfield* as to the point decided, was opposed by a majority of the Judges who decided the cause. He held that the King could call upon the trustee to execute the trust in his favor, the *cestui que trust* having died without heirs; and this opinion he founded on the position that the trust was, in the consideration of a Court of Equity, the land. But the other Judges held that the trust was gone, and the trustee held discharged of any liability. This case proves that, in a strict sense, the trust is not either the *land* or the *estate*, or equivalent to either, for if it were, why was not the King entitled by escheat?

It is said that the decision of *Sir W. Grant* in *Cholmondely* v. *Clinton*, has been reversed. It is true, but the position for which that case was cited, was fully supported and confirmed by his successor, as will be shewn in another part of this argument.

The citation from *Jacob* and *Walker's* Reports will be examined presently, and it will be seen that its true meaning is only, that in equity the *cestui que trust* is considered the owner of the estate, his interest being in nature of a seisin, and capable of an adverse possession, in nature of a disseisin at law.

It is believed, then, that the ground taken in the opening argument is fortified by the examination given it on the other side. That a trust attaches on the *land* as distinguished from the *estate* therein, is supported by no authority, and countenanced only by occasional, hasty, and inaccurate language, while both authority and analogy shew, that the trust as an incident of the estate, perishes with it.

Was there relief at law?

The Plaintiffs either come here on the footing of a trust upon the legal estate of *Cossart*, or as entitled to the mortgage term of *Graff*. As to the first, it has been shewn that if there was such a trust, it was void, or if the land vested in the state, the trust ceased. As to *Graff's* mortgage, there is no proof that it was designed for the the benefit of Plaintiffs, neither the mortgage nor the assignment shews it—and no document takes notice of such an interest but the will of *Marshall*, made in December, 1802, several years after the commencement of the suit. If it did appear, it is void, or if not, it is but a trust of the term of which *Bagge* had the legal title. And in either view, this Court cannot entertain a bill against us, who hold adversely to all the parties, and claim no estate under any of them. The Plaintiffs having no interest in the suit, cannot help the jurisdiction by making Defendants with us, those who have that interest. As to the latter, was there not clear remedy at law, if the legal title passed to *Montgomery*? Can they seek relief here *now*, because by their neglect, they are barred at law? Or if not barred, why come here at all?

Are we protected by the statute of limitations?

This is certainly the great question in the cause, and it is necessary to examine the argument so ably urged by the Counsel on the other side, with care and attention.

As a preliminary step in this part of the argument, we must inquire whether the land of *C. F. Cossart* vested in the state either by the confiscation acts, or by the effect of the revolution. In support of the latter, nothing is adduced, and it is directly contradicted by the decision in *Campbell* v. *McArthur*, (*N. C. T. R.* 115.) Then as to the confiscation acts. That of November 1777, *Ch.* 17, is the only one which can be supposed to affect our case. *Cossart* was not within the operation of it ; the preamble describes three classes of persons as within the view of the legislature, viz. those who had withdrawn themselves from the state, and become attached to the enemy, those who had withdrawn to foreign parts in order to avoid bearing part in the defence of the freedom of the state, and those who being out of the United States at the commencement of the war, had failed to " return." Within the two first classes, it cannot be pretended that *Cossart* is included, and the word " return" in the clause describing the last class, shews that none was intended but those who had been our citizens, and ought to have joined their countrymen in the struggle for independence. The Legislature had no view to seize the property of native citizens of Great Britain, who had never been resident here, and from whom we had no right to expect assistance, but to punish those who had withdrawn from, or kept away from their homes in order to assist the enemy, or unjustly to withhold their aid from us. The latter was a proper and laudable purpose, and the former would have been injurious and illiberal, and therefore, the latter is to be supposed the purpose of the Legislature. Besides, this is a highly penal statute, and is to be construed strictly.

But further, the act specifying neither the individuals nor the property, nothing was divested out of the owner, and nothing passed to the state till an office found, or something in nature of it. (*per* Taylor, J. *in Faris and Wife* v. *Simpson, Conf. Rep.* 178.) And this appears to have been the understanding of the Legislature, for by the act of Oct. 1779, *C*. 2, after reciting that many persons who came within the description of the previous confiscation laws, had failed to return, it is enacted that the estates of certain individuals, specially named, " shall be fully forfeited." The case of *Campbell and McArthur* expressly decides, that persons owning lands in North Corolina, had a right to decline taking part in the controversy, and to sell their lands to any citizen, and that when such sale was made, and the title passed to a citizen, it was not competent for the Legislature to divest it. But the sale to *Montgomery* was made in July, 1778, when no seizure had been made which divested the estate, and consequently the land was not within the operation of the act of 1779. It is not to be presumed the Legislature intended to divest the title of a loyal citizen; but if they did intend it, they had not the power.

If, however, the land did pass to the State, the trust on the principles already stated was gone; but if, as we suppose, the title passed to *Montgomery* as to the fee, and as to the term of 500 years was vested in *Graff*, are we not protected by the statute?

It is admitted by us that naked possession is not sufficient —then had we not color of title? We had a grant covering the premises and professing, and for anything which appears upon its face, effectual to pass the title. Several reasons have been urged why this is not sufficient.

1. That the land was confiscated, and therefore the grant was not color of title. The position is denied, and if true, the conclusion does not follow. The act of 1779, *Ch.* 5, *Sec.* 12, declares all entries of confiscated land void, and hence the counsel concludes, that a grant for such land, will not operate as a colorable title. This reasoning is unsound, for the act establishing the land office, and prescribing what lands may be entered, expressly excepts lands which had been before granted by the King and the Lords proprietors; and further, the last section of the Bill of Rights, which declares the right of soil to be in the people, expressly saves the titles of those claiming under such former grants. There can be no doubt, therefore, that an entry of previously granted lands is void, because the Legislature had not authorised it, and because a higher power than the Legislature had excepted such lands from the general right of soil,

claimed for the people. If, then, a grant of confiscated lands is not a color of title for the reasons urged, a *fortiori* a grant of appropriated lands, is not. But a grant of lands appropriated, though it passes no title, is yet color of title by the universal practice and assent of the profession, and the contrary, no lawyer would, at this day, maintain.

But in order to ascertain what this objection is worth, let us see what is the nature of a color of title. It is, says this Court in *Tate's heirs* v. *Southard*, (3 *Hawks*, 119,) "a writing *upon the face professing* to pass title, but which does not, either from want of title in the maker, or from some defect in the instrument." Therefore a deed from baron and feme, without privy examination, is color. (2 *Hayw.* 235.) So a devise by one not entitled, although the statute of Wills gives the right to devise only to those who are seised, &c. (1 *Murph.* 413—2 *Hayw.* 9—*N. C. T. R.* 19.)

So an unregistered deed, though registration is essential to its operation, (2 *Hawks*, 33.)

So an unconstitutional act of assembly, though such act is absolutely void. (*Episcopal Church* v. *Newbern Academy*, 2 *Hawks*, 233.)

And so also, a deed executed in the name of A, as attorney of B, though without authority, (2 *Murph.* 14.) And so, in our case, the officers of the State signed the grant, and affixed the great seal without authority, and it is difficult to conceive why this should not be color of title also.

The objection pre-supposes as its foundation, that the statute operates to perfect those titles which are partially defective only; but this is an entire mistake. The statute pre-supposes a party totally without title, and protects his possession because he *seems* to have one; the claim which a party sets up is, and generally must be entirely void, in order to the operation of the statute at all. (2 *Jac.* and *Wal.* 160.)

2. It is objected that the defendant had notice that the lands had been before granted. To this objection the case before cited of *Reddick* v. *Leggett*, and the second section of the statute itself, furnish a conclusive answer.

3. It is said our claim is based on fraud, and equity will therefore strip us of our legal defence. The only fraud which is charged, or can be pretended to be proved, is taking a grant of lands, with notice that another claimed them. That is of no avail to prevent the bar of a legal estate in a Court of Law, according to the case of *Reddick* v. *Leggett*, so often referred to; and if it furnish a ground for the interference of equity, the decision of that case does not protect the possessor, but only puts him to the expense and delay of a suit in equity instead of the shorter and cheaper remedy at law.

It is surely a mistake to say that our statute operates directly on remedies only. If this be intended, it operates expressly and immediately upon the "title and claim," and the remedy ceases because the right is gone.

It seems then clear, that the legal estate was barred by the statute: and this brings us to the enquiry, if the equitable or trust estate was thereby destroyed.

No new cases are brought forward by the opposite Counsel, but he has endeavored to escape from the force of those cited in the opening argument.

It is said by the Counsel, that in *Pentland* v. *Stokes*, there were trustees to protect the inheritance, but can that circumstance have any effect upon the decision? Every lawyer knows that in settlements, trustees to support the contingent remainers, are intended not to protect the estate from the acts of strangers, but to prevent the ulterior contingent limitations from failing, by the forfeiture of the previous life estates, before such limitations have become vested.

It is said that the opinion of *Sir Wm. Grant*, in the case of *Cholmondely* v. *Clinton*, was overruled when the same case came before *Sir Thomas Plumer*, as reported in 2 *Jac. and Walker.*

Let us examine that case and see if there was any difference of opinion between those two great Judges, upon the point to which I have cited, and the only one material to this discussion.

The case is sufficiently stated for the present purpose by saying, that the defendant entered into possession of certain mortgaged premises, claiming to be entitled to the equity of redemption, and with the assent of the mortgagee, received the profits for more than 20 years, after which the Plaintiff filed his bill, alleging that in truth, the estate subject to the mortgage was his, and praying an account and relief. The question whether the Plaintiff or Defendant was originally entitled, depended upon the construction of certain deeds of settlement; and at the hearing before *Sir William Grant*, that the question was discussed, and it was also insisted by the Counsel for the Defendant, that whether the Defendant was originally entitled or not, yet he was then entitled, by the operation of the statute of limitations, which had barred the Plaintiff's right, and vested it in the Defendant.

The Judge was of opinion, that there could be no such thing as a disseisin of an equitable estate, while the legal estate subsisted; that a tortious act could not be the foundation of an equitable title, which might be barred by barring and excluding the estate of the trustee, but could never be transferred from one person to another. He therefore directed a case, to take the opinion of a Court of Law upon the construction and effect of the deeds of settlement, (2 *Mer. Rep.* 171.) When the cause came on for further directions, *Sir Thos. Plumer* had succeeded to the office of Master of the Rolls, and the case was again elaborately argued before him, (2 *Jacob and Walker's Rep.* 1.) His Honor was of opinion that the effect of the deeds was not material to the decision of the cause, for that admitting the title to have been originally in the Plaintiff, he was barred by the statute of limitations, and the Defendant was then entitled, although the legal estate was subsisting in a person, whose title both the Plaintiff and the Defendant admitted. But the position laid down by *Sir William Grant*, "that by barring and excluding the legal estate, the equity was also destroyed," so far from being questioned, was distinctly admitted by the Counsel for the Defendant, (2 *Jacob* and *Walker, pages* 18, 51,) by the Counsel for the Plaintiff, (*page* 62,) and by *Sir Thomas Plumer*, (*vide pages* 146, 147, 148, 153, 154.) The real difference between these Judges was, that the former held that, to be the only mode of barring the equity, while the latter, admitting that to be one mode, insisted upon the existence of a separate independent bar of the equitable, without regard to the legal estate—by which, in analogy to a disseisin at law, the equity would be acquired by the possessor, and the trustee hold the legal estate for him, as he before held for the rightful owner of the equitable estate.

But it has been said by the Counsel on the other side, that *Montgomery* had only an equitable title, and that the statute operates only at law, and not upon equities; and *Jones* v. *Pierson* and *Falls* v. *Torrance* are cited.—These were cases of pure trust, but it cannot be pretended that we were more than trustees by implication. In relation to the latter, the statute even in England applies, and the reasons, founded in the peace and welfare of the community, are forcibly given by *Sir Thomas Plumer*. (2 *Jac.* and *Wal.* 139 *to* 149.) But our statute applies directly in its terms to the right, and bars it. The Jamaica statute, expounded by *Sir William Grant*, in *Beckford* v. *Wade*, is like our own, except that it contains an express exception of trusts. Yet *Sir William Grant* held that exception to be confined to direct trusts, and that the statute would operate in all cases of trusts, by implication. His reasons for that opinion are worthy of profound attention, not only on account of the source from whence they come, but also for their intrinsic value and excellence.

Two other grounds are insisted upon why the Court should disregard the bar of the statute.

1. It is said our title is founded in fraud—to which it would be a sufficient answer to say, that the statute operates upon the supposition that we have not a title—we rely upon the lapse of time, and not upon the title. But what is the fraud? Taking our grant with knowledge of Plaintiff's claim. Suppose it so—what follows? that we cannot use the statute to protect us? No—but we cannot use that title.

That fraud will vitiate every transaction, is true; if a title be fraudulently procured, it is not a good title; and therefore cannot be supported as such—but it may appear *on its face* to be a good one, and if the party having title neglect to assert his claim, it becomes by lapse of time, what it was not at first, to wit, a good and valid title.

If we had by a fraudulent contrivance, prevented the Plaintiff from proceeding to assert his right at law, that I admit, upon a proper bill, might be ground to deprive us of the benefit of the statute. But no such case is made by the bill, or shown in proof.

The position that fraud in acquiring a title, will deprive the party of the benefit of the lapse of time, is directly contradicted by *Lord Kenyon*, in the case of *Bonney* v. *Redgard*. (1 *Cox*, 145.)

It was contended in *Cholmondely* v. *Clinton*, that a wrongful tortious act could not be the foundation of a right in equity, and hence would not be aided by the lapse of time; but *Sir Th. Plumer* held otherwise, and his decree was affirmed in the House of Lords. See also *Mr. Butler's* argument in that case, and the cases cited by him, from page 47 to 50. (2 *Jac.* and *Wal.*)

2. The difficulties of the Plaintiffs, the unsettled state of the country, and the prejudices against their claim, soon after the war of the Revolution, it is insisted, furnish an answer to the statute.

But in the case of *Cholmondely* v. *Clinton*, the Master of the Rolls held that neither poverty, ignorance, nor mistake will save a case from the bar of the statute.—(2 *Jac.* and *Wal.* 139.)

And in *Benyon* v. *Evelyn*, it is expressly decided, that though the Courts of Justice are closed so that a party cannot bring his action at law, still the statute will run against him, (*Bridgman's Rep.* 324,) and this case is cited with approbation in *Beckford* v. *Wade*, (17 *Ves.* 96.)

Lastly, it is urged that our grant is liable to be set aside and vacated on the ground of fraud, and hence it is not color of title, and for this is cited *McRee* v. *Alexander*. To cite the case for this purpose, is making the Court say, what they expressly declare in that case they do not mean to say. But it is useless to prosecute this enquiry, because no case is made in the bill, or supported by the proof to raise the question.

Upon the whole, it is conceived that three points, at least, have been established—that the trust, if any, for the *Unitas Fratrum* was void; that if good, the legal title passed to *Montgomery*, and has been barred by the statute of limitations, and that of necessity the trust is gone with it, and that if title to the land vested in the State, she held discharged of the trust, and so granted to us; and it is submitted, as the result from these propositions, that the former decree was erroneous, and ought to be reversed.

HENDERSON, Judge.—I shall place this cause upon a single point—the defence set up under the statute of limitation, which depends upon the right of the Defendants to use in this Court, their grants from the State as color of title. I consider it entirely unimportant to either party, whether the lands were granted to *Cossart* in trust for the *Unitas Fratrum*, and if so, whether the trust was valid. For if both propositions were decided in the affirmative, if *Cossart* has lost his estate, the *cestui que trusts* have lost theirs also, their interest being a mere shadow of the legal estate, vanishes when that ceases to exist—that is, when a different one arises, or in the language of the law, where another comes in the *post* to an estate in the lands. I do not mean where the estate, to which the trusts were annexed, falls into other hands than those appointed by the creator of the trust to take it; as where the devisee in trust dies before the devisor, there the heir takes the estate subject to the trust. The law is the same as to tenants by the curtesy, tenant in dower, and the bargainee under a bargain and sale, who are said not to come in by the trustee, but by the law, *their estates* being the same with that of the trustee, and cast upon them by law, although not created by the act of the party. Nothing but the technical expression, the *per* and the *post*, and not going beyond the letter of the maxim into the principle upon which it is founded, can for a moment sustain the idea, that those estates were detached from the trusts. But the lord who comes in by escheat above his tenant's estate, the abator, the intruder, the disseisor, who thereby acquire a new estate, are not affected by the trust; and if as against them the trustee loses the legal estate, the trusts immediately vanish, as the shadow disappears when the substance is gone. The trusts remain dormant, until the legal estate is regained by the trustee, when they immediately spring up again. The Plaintiffs, or more properly those who claim *Cossart's* estate, cannot attach a trust upon the estate of the Defendants, through the medium of the State, upon the idea, that she, upon the alienage of *Cossart*, succeeded to his estate, subject to the Moravian trust, if any existed; and that the lands were then granted, subject to the same trusts.—For in reality, *Cossart's* estate did not come to the State at all, neither by the revolution, nor by the confiscation acts, according to the principles adopted in the case of *Campbell* v. *McArthur.*

The Plaintiffs equity is to have the grants of the Defendant surrenderred up, as fraudulently obtained, both as against the state, and against them. It is shown that long before the 4th of July, A. D. 1776, the lands in question, were granted by *Lord Granville*, the then proprietor, to *Cossart;* and that the Defendants with a *knowledge* of that fact, for rumor in this Court is knowledge, entered and obtained grants for them from the state, under our entry laws, as vacant and unappropriated lands, in violation of both the letter and the spirit of those laws. I say that rumor is knowledge in this Court, if the rumor turns out to be correct. For although in this case, as the Defendants say, there was but a report, a mere rumor that the Moravians claimed these lands, which some pretended to believe, but more disbelieved, this rumor was notice; it should have put them upon enquiry. And if the rumor turned out to be correct, and the lands had been granted, whether to the Moravians or to others it is unimportant, for the fact of their having been granted, and not the names of the grantees, rendered the conduct of the Defendants fraudulent, they must take the consequences. They cannot say, that they were innocent purchasers, who had paid their money. They took upon themselves to determine as to the truth of the report. The report turns out to be true. Equity requires that they should abandon their designs, and their persisting in them, after the rumor was ascertained to be founded in fact, is conclusive, that had they thought their design would have succeeded, they would have made the attempt with a perfect knowledge of the fact. In fine, it was a game of hazard; they adventured, and have lost. The report turns out to be true; the lands have been granted, and they must take the consequences. But the Defendants say they were not granted to the Moravians, nor to any one in trust for them; that *Cossart* held to his own use and benefit; that if their design was fraudulent, it was against the Moravians, and not against *Cos-*

sart. It is no defence either in the civil or criminal code, that the blow was not designed to injure the persons stricken, but another? neither is it in this Court. The Defendants stand therefore before this Court, as having obtained their grants upon suggestions which were not only untrue, but which they knew to be untrue; they ask to be permitted to retain them. Upon what principle shall this be permitted? For what purpose? They tell us now to connect them with a seven years possession, and thereby bar the recovery of the Plaintiffs under that very title of which they had notice when they obtained their grants, and to defeat which, by some indirect means, was their original object. If compelled to give evidence against themselves, this must be their answer; for without foreign aid, their deeds were worthless. The lands had been previously granted. The grantor had nothing in them. Besides, they were obtained from a grantor to whom a fraud cannot be imputed, and if in dealings with such a grantor, any exist, the consequences must be borne by the grantee. It appears to me, that to refuse our interference would be to reward iniquity, not to redress a wrong.

It is to be observed that the State, *ex mero motu*, or at the instance of the party aggrieved, would have caused these grants to be surrendered up to be cancelled. When this bill was filed, a Court of Equity, by the well settled decisions of our Court, was the proper place to apply for redress against a fraudulent grant. Judge *Haywood*, it is true, for some time struggled against this practice, contending that the proper redress was at law; but he ultimately yielded.

If *Earl Granville* had granted, or rather passed to *Cossart* an equitable title, and the lands had come to the State subject to the Equity, and the State had made the grants to the Defendants with notice, as in this case, can there be a doubt but that this Court would have made the Defendants trustees for the Plaintiffs?—and where is the difference ? In reality there is none ; it lies only in a name. In the one case they have the legal title—in the other the equitable. In the first case, they come into a Court of Equity, not for the legal title, but to protect it, to guard it from harm and injury, as if the boundaries are obscure, or the land-marks wearing out—Equity will relieve by establishing them, and that upon the bill of one having the legal title. So also if a fraudulent deed has been obtained from the grantor, or from a stranger, and there is a *probability* of annoyance to him having the legal title, Equity will relieve by compelling a surrender of the fraudulent deed—Equity will remove every thing that improperly clouds or obscures a legal title, one great object of the Court being to give repose ; to quiet and remove all fears and apprehensions arising from the fraud or iniquity of others, with regard to property. All that is required to be shewn is, that the fears are not idle or imaginary, and that there is a probability of harm.

Had this bill been filed, calling for a surrender of these grants after the facts in relation to them had been established, and soon after they were issued, the only possible defence which could then have been set up, would have been that the Plaintiffs apprehensions were groundless ; and that the grants were perfectly harmless ; for the Plaintiffs being the elder, and of course the better title, could not be affected by them. To this it might then be properly answered, as the event in this case has shown to be true, although the deeds are fraudulent and void, yet they may be used to our annoyance. In the first place, they cloud our title, and may injure us should we wish to sell. But worst of all, you may connect them with a seven years possession, and bar our estate. You may also, under cover of them, preplex us with a lawsuit for almost half a century. These are certainly not such idle fears, or imaginary injuries as would induce the Court to dismiss the bill, because the Plaintiff had not made out a case of impending harm. If these anticipated injuries would be a sufficient reason for sustaining the bill, if filed immediately after the grants were obtained, *a fortiori*, the reality is now sufficient ground for affording relief. The lapse of eight or ten year after our Courts were opened, before filing this bill, forms no defence, and more especially when in that short space of time, an attempt was made to obtain redress at law, and which failed, probably from the temper of the times, for I imagine that no title derived from *Cossart* would then have been recognized. I feel therefore satisfied, that this Court is bound to take from the Defendants their grants, and all benefits derived from them; that they should be detached from the possession. In my mind, the possession set up under them by the Defendants, tends to weaken their case, as to retaining the grants, It shows in glaring colors the impropriety of permitting them to be retained, and settles the question as to the right of this Court to interfere. I have used throughout this opinion the terms *fraudulent*, *iniquitous*, *&c.*-- I apply them in their legal sense only, not by any means intending to impute corruption or fraud in its ordinary acceptation to the Defendants; I use them for want of some milder terms.

I feel some difficulty in affirming the decree, on account of the place in which *Montgomery's* devisees stand before the Court. They unquestionably should have been Plaintiffs instead of Defendants; and it is difficult to conceive why they were not originally made Plaintiffs. It can be accounted for only from the ignorance of our Equity practitioners. But they are before the Court; consequently their interest is bound. Their rights were as fully contested by the other Defendants, as if they were Plaintiffs. I cannot perceive that any prejudice has arisen to any one of the parties on that account. I repeat again, that this Court does not take from the Defendants the benefit of their grants, because the land had been before granted, but because in addition thereto, they knew that they had been granted. Their object was to deceive or defraud some one, if not at first, most certainly when they learnt that the lands had been granted. They then well knew, that all they acquired by their grants was taken fraudulently from some other person; and they cannot rightfully gain any thing by them, if they are in fraud of the rights of others.

Hall, Judge.—It appears to me that the ground is tenable, that the devisees of *Montgomery*, have a right to redeem against the Defendants. In considering this question, no reliance is placed upon the trust supposed to be in the *Unitas Fratrum*. I also admit that when a person comes in to an estate in the *post*, as the King by escheat, such estate is held free from a trust; but an equity of redemption is not such a *trust*.

In a Court of Chancery, an equity of redemption is defined by *Sir M. Hale*, to be an equitable right inherent in the land, binding all persons in the *post*, that is, persons coming in paramount to, and not under the title of the mortgagee. The lord of the mortgaged lands when he enters for an escheat, takes them, subject to the rights of the mortgagor (1 *Powell on Mort.* 11, 337—*Hard.* 479.)

Lord Nottingham says an equity of redemption charges the land, and is not a trust. In a Court of Equity, the equity of redemption is the fee simple of the land, (*Ibid.* 338, 11.) If then the land escheated to the State, subject to *Montgomery's* rights as mortgagor, it was bound by those rights in the hands of the grantees of the State. If it be admitted, that if the land had escheated to the State and was then conveyed to the Defendants, and their estate was not a continuance of the estate of the mortgagee's, so as thereby to subject them to the equity of redemption, for the mortgagee's estate was at an end, and that the State held the lands as the lord by escheat was supposed to do before he granted them at all, viz. that he came in in the *post*, was in of another estate, and further if it be admitted that there was no privity between that and the estate of which the mortgagee was possessed; still he held them subject to the equity of redemption.

The same remarks are applicable to a case where the lands do not escheat, as where the King or the State seizes them without right, and grants them to another, the grantee comes in of a new estate, and holds in the *post*; no reason can be given why he should not hold them, subject to the equity of redemption, as well as if they had escheated, and had then been granted. The principle is laid down as a general one, that the mortgagor can redeem against all persons coming in in the *post*, and the King by escheat, is only put as an instance. The reason assigned is, that when the money is paid, the mortgagor is placed *in statu quo*, the land having been only pledged for the money.

If then the lands of the Defendants are subject to the equity of redemption, is that right barred by length of time? In England, the right of the mortgagee is barred by twenty years adverse possession, by the express provision of the statute of limitations. The right of the mortgagor is barred by the same length of time in analogy to it. Here the mortgagee is barred by seven years adverse possession, by the act of 1715, (*Revisal*, *chap*. 2.) The mortgagor is barred by no time in analogy to that act, but only by twenty years, in analogy to the rule of the English Chancery. On this point, I need make no remarks; I consider the question to be at rest. (*Falls* v. *Torrance*, 4 *Hawks*, 420.) It results then, that the mortgagee may be barred by seven years possession at law; the mortgagor has twenty years to redeem in equity.

It is admitted, that the interest of a *cestui que trust* is dependant on that of the trustee in ordinary cases of trust, and if the trustee is barred by length of time, the trust is lost. But an equity of redemption is an inherent right in the land, and binds the lord, or the State by escheat, as well as their grantee. And if the mortgagor had twenty years to redeem against the mortgagee, no reason can be assigned (as it appears to me,) why he should not have twenty years to redeem against the lord, or the State, or their grantee; because the escheat to the King or the State, and the grant by them to an individual, were acts over which the mortgagor had no control, and his rights on that account, ought not to be weakened.—Further, when it is said that the King holds escheated land, subject to an equity of redemption, it is understood that he holds it in no manner more injurious to the mortgagor, than when it was held by the mortgagee; and that consequently the grantees of the State in this case take the land with the same burthen that existed, before it was granted to them. I therefore think, in this case, that the right of the mortgagor is not barred by lapse of time.

But it has been argued, that the mortgagee might have asserted his right at law against the Defendants, by bringing a suit for the land. It is true we now know he might have done so, but the reasoning of the Judges in the case of *Bayard* v. *Singleton*, (*Martin*, 58,) leaned to the position, that an alien to our constitution could not hold lands here; and this opinion was entertained by one of the most eminent lawyers of that day, (Judge *Johnston*) as appears by his opinion in the case of *Den ex dem of Stringer* v. *Phillips*, (2 *Hay*. 158.) Indeed, we see how fruitless the suit turned out to be, that was brought by *Montgomery's* trustee. If a suit has not been brought by the mortgagee, the rights of the mortgagor are not to be injured on that account. It is not the case of a trust, which may be lost by the loss of the legal title; but it is the case of an equity of redemption, inherent in the land, where a bill will be sustained against any person, if brought within twenty years.

An objection presents itself in this case to the form of proceeding. The devisees of *Montgomery* are not Plaintiffs, which they certainly ought to be, in the view I have taken of it; because it is principally for their benefit that a decree is sought against the Defendants. But to say the least of this suit, it is an extraordinary one; at least, so far as relates to the time it has been depending. It appears, that a suit at law was brought in Morganton Superior Court, some time after the Revolutionary war, in which a nonsuit was entered in the year 1789. The present suit was commenced in the year 1793, not many years after a Court of Equity was first established in this State, after the Revolutionary war. At that time, there were doubtless but few of the profession who were well acquainted with Equity practice. The case has been brought to this Court several times, and partially argued. This is the second time it has been argued on its merits. It has been argued at great length, and the Counsel for the Plaintiffs at each argument have taken the ground that the trust of the *Unitas Fratrum* ought to be enforced. And in that view of the case, there cannot be the same objection to parties; because *Benzein* not only represents the mortgagee, but also the interests of the *Unitas Fratrum*. And admitting his pretensions to be well founded in the latter character, the devisees of the mortgagor are properly made Defendants. This is not the case, however, in the view I take of it. Under all these circumstances, if a decree can be made which will reach the justice of the case, it ought to be done. The parties are all before the Court. It is the interest of the mortgagor and mortgagee, as well as their wish, that a decree should be made. The case comes as fairly before the Court, and the interests of all parties can be as well consulted, as if the devisees of *Montgomery* were Plaintiffs. The mortgagee as such, and not as representing the *Unitas Fratrum*, prays for a decree, and he is interested in doing so. It is proper on his account, that the mortgagor should be put in possession of the land, and receive the profits; otherwise he objects to the payment of the purchase-money due to *Cossart.*

. This view of the case steers clear of any injury to the Defendants, because if they are answerable to the devisees of the mortgagor in case they were Plaintiffs, they cannot be injured or placed in a worse situation, in case a decree is made against them on the same principles, in the present suit.

I hope and think that this case cannot, and will not be drawn into precedent, unless in cases marked with the same circumstances of delay and embarrassment, to which it has been subjected. Further delay would breed further litigation, and be productive of no good to either party. My opinion, therefore, is, that a decree should be entered for the Plaintiffs, or rather that the former decree be affirmed.

Per Curiam.—Let the petition be dismissed with costs.

EQUITY CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
NORTH-CAROLINA,
DECEMBER TERM, 1828.

James Grant
v.
Edward Pride, } From Halifax.

Commissions to executors are not a right attached to the office, but are an allowance for their trouble and risk in settling the estate;—therefore, where there was two executors, and one took upon himself more than half the trouble and risk, it was held, he was entitled to more than a moiety of the commissions.

The case made by the bill, answer and proofs in this cause was that the Plaintiff and Defendant were executors of one *Redding Jones;* that the Plaintiff resided in Halifax County, and the Defendant in Wake, near the residence of their testator; that most of the business connected with the estate of *Jones*, was performed by the Defendant, although the Plaintiff gave all the aid in his power; that the sum of $692 67 was allowed the Plaintiff and Defendant for commissions; and that the Defendant, having all the funds in his hands, had refused to allow the Plaintiff any part thereof. The prayer of the bill was that the Defendant might pay to the Plaintiff, one-half of the sum allowed for commissions.

The case was submitted without argument by *Seawell* for the Plaintiff, and *Badger* for the Defendant.

Hall, Judge—The office of executor or administrator does not *per se* draw commissions after it as a matter of course. They are allowed for services rendered in liquidating and settling estates. Therefore, if one executor performs more labor, and renders more service than another, he is entitled to a greater share of commissions.

In the present case, it appears that the Defendant rendered all necessary services in adjusting and settling the estate of the testator; that the Plaintiff did attend at some few public meetings; but the amount of service rendered by him has not been made to appear. He lived at a considerable distance; the Defendant lived very near the estate, kept all the papers, transacted the business with all concerned, and finally settled it, and held on upon the commissions.

It is unnecessary to refer the case to the master, because it is confined to a narrow compass. I am authorised to say, that a decree may be entered for one-sixth part of the commissions allowed to the Defendant, and that each party pay their own costs.

Per Curiam.—Let a decree be entered accordingly.

Elizabeth Jourdan et al.
v.
Simon Green et al. } From Franklin.

The word *Heirs*, in a will, where the testator recognises the existence of the ancestor, means *heirs apparent*. In a bequest to J. P. and the heirs of S. J., J. P. takes a moiety.

In such a bequest to heirs, if it be of a present interest, those only take who were born at the date of the will, and perhaps at the death of the testator. But if the interest is expectant upon a life estate, those take who are born before the expiration of the particular estate.

Burwell Perry, on the 10th of July, 1818, made and published his will, which as far as is material to this case, is as follows:

"I give and bequeath unto my wife *Elizabeth Perry*, "one negro man named *Simon*, and one named *Peter*, and "a woman named *Suky*, together with the balance of my "stock, and household and kitchen furniture, that is left "after paying my just debts, to her during her natural life, and "after her death to be equally divided between my son *John*, "and my daughter *Sally Jourdan's* heirs.

"I have already given to my daughter *Sally Jourdan*, one "negro boy, *Bob*. I also give and bequeath to my "daughter *Sally Jourdan's* heirs, a negro boy named *Adam*, "and a negro girl named *Sylla*."

The bill was filed by the Plaintiffs who are the children of *Sally Jourdan*, born before the death of the testator *Burwell Perry*. It averred the death of the widow *Elizabeth Perry*, and the Plaintiffs insisted that they were entitled to an equal share with *Joha*, *per capita*, of the negroes *Simon*, *Peter* and *Suky*, and her increase.

The Defendants who were the children of *Sally Jourdan*, born after the death of the testator, and the assignees of *John* the son, admitted the facts set forth in the bill, and submitted to such construction as the Court might put upon the will.

The case was submitted without argument, by *W. H. Haywood*, for the Plaintiffs. No Counsel appeared for the Defendants.

Henderson, Judge.—The words "heirs of *Sally Jourdan*" in this case, means heirs apparent—the next of kin apparent, as the testator in his will takes notice that she is alive, by declaring that he had given her, negro *Bob*.

The bequest of negro *Adam* and *Sylla* importing a present interest, none of the children of *Sally* can take but those born at the time of making the will; at furthest, only those born at the testators's death, and in this case it makes no difference which period of time is taken, for none were born in the interval.

As to the property bequeathed to *Sally's* heirs, after the death of his wife, as there was no present interest bequeathed, those take who were born before the wife's death. It is sufficient if they answer the description, when an interest vests in possession. This rule was adopted by the old Supreme Court, in the construction of the will of one *Rogers.* If we could, we would give the property to all *Sally's* children, no matter when born, but we cannot depart so far from the words of the will.

We shall declare that *Betsey*, *John*, *Burwell*, *Perry*, *Eliza* and *Martha*, (those born before the testator's death) are entitled equally to the negro boy *Adam*, the negro girl *Sylla* and her increase, with their hire and profits ; and that they with *Samuel*, *James*, *Sally* and *Martha*, being all the children of *Sally Jourdan*, born at the death of the testator's wife, are entitled equally to one-half the negroes and other property, bequeathed to *Sally Jourdan's* heirs, after the death of the testators's wife, including the increase of females since that time, and the hire, profit and the interest. The other half of that property belongs to the testator's son *John ;* for all the children, that is all the heirs, take as one person *quoad John.* When his share is to be ascertained, the word "*heirs*" is *nomen collectivum.*

Per Curiam.—Let the decree be entered accordingly

John Barnes
v. } From Wayne.
Turner Dickinson,

Where a party had an adequate legal remedy, and has brought an action and failed in it, he has no right to the aid of the Court of Equity.

The allegations of the bill were, that the Plaintiff in the year 1810, bought of one *Robert Fellow,* a negro woman, who continued in his possession for many years, during which time she had several children ; that in the year 1821, the Defendant privately procured the slave and her children, to leave the premises of the plaintiff, and took them into his possession. The bill then set forth the title under which the Defendant claimed the slaves, which was shortly this—that one *Mathew Turner* had held them as the bailee of one *Wally Turner*, on whose estate the Defendant had taken out letters of administration.

The bill then charged that the Plaintiff had brought an action of detinue against the Defendant, in which he had failed. (*Vide North Carolina Law Cases*, 346.) The bill prayed an injunction and general relief.

Upon the motion of the Defendant, his honor Judge *Martin* on the last Circuit, dismissed the bill for want of equity—whereupon, the Plaintiff appealed.

The case was submitted without argument by *Gaston* for the Plaintiff, and by *Badger* and *W. H. Haywood* for the Defendant.

Henderson, Judge.—I cannot perceive upon what grounds this bill can be sustained. If the Plaintiff has any title, it is a legal one, unmixed with any principle of Equity, and not beyond the reach of ordinary tribunals to afford relief. He has had a trial at law upon the merits, and has failed.

Per Curiam.—Let the decree made in the Court below be affirmed with costs.

Rosamond Taylor
v. } From Nash.
John Vick et al.

Where a son who died intestate, unmarried and without isssue, is bound by his agreement to support his mother, it was held, that she having succeeded to his personal estate absolutely, and to his real estate for life, had no claim against the heirs on account of their interest in the land, expectant upon her life estate, notwithstanding she had advanced the money for the purchase of that land.

The Plaintiff in her bill alleged, that she was the mother of *Samuel Winstead* ; that *S. W.* purchased a valuable tract land, at the price of $2,260, but being unable to make the payment for it, he applied to the Plaintiff for aid ; that *S. W.* being the Plaintiff's only child, she, with, the view of aiding him in making payment for the land he had bought, gave up to him six slaves, valued at $1,800 ; that in consideration of the surrender by the Plaintiff of the negroes, *S. W.* promised to support and maintain her during her life ; that afterwards *S. W.* for his own convenience, and to aid in making payment for the land bought by him, sold the dower of the Plaintiff in the real estate of her last husband, *Drury Taylor*, for the sum of $300, and applied to the Plaintiff to execute a deed to the purchaser, which she refused, unless *S. W.* would agree to convey to her the land which he had bought, and to which he assented ; that *S. W.* died intestate, unmarried, and without issue, and without having in any respect complied with his engagements to the Plaintiff, to convey to her the land bought by him. The prayer was for a specific performance of the agreement to convey the land.

The Defendants, who were the heirs of *Samuel Winstead*, denied the agreement set forth in the bill ; relied upon the act of 1819, concerning parol contracts for the sale of lands, and insisted that the Plaintiff having succeeded to all the personal estate of their ancestor, which was large and valuable, and being entitled to a life estate in his land, had no claim whatever, to a support out of the assests which descended to them.

Replications were filed to the answer, and it was heard upon proofs taken, which it is not necessary to set forth.

Devereux, for the Plaintiff.

Badger, for the Defendants.

Henderson, Judge.—The Plaintiff, however much to be pitied, for in justice she is entitled to the whole estate of her son, real as well as personal, in preference to a remote collateral heir, and the more especially in this case, as she furnishes most of the funds with which the lands were purchased, yet has no grounds on which she can stand. For we are clearly of opinion, that the promise of support satisfied the transfer of the slaves; and if it did not, she has the whole personal estate as her own, wherewith she may satisfy it. At least that forms no ground of relief in this bill. And as to the agreement to convey to her the lands in question, in consideration of her selling for the son's benefit, her dower in her late husband's lands, we are well satisfied, from the testimony, that nothing more was intended than a life estate, a home for life ; and that also she has got, for on her son's death without issue, and without brother, sister, or father, the lands descended on her for life.

Per Curiam.—Let the bill be dismissed with costs.

Hugh McAuley and William Beard
v.
Robert Wilson, Executor of William Henderson.

John Henderson and others
v.
Robert Wilson, Executor of William Henderson.

From Mecklenburg.

The doctrine of execution *cy pres* does not prevail in this state, and if the intention of a testator cannot be literally fulfilled, a trust results for the heir, or next of kin.

Where a testator bequeathed property in trust, for the support of a Minister of the Associate Seceding Party, " who shall preach at the Seceding Congregation Meeting House, called Gilead," and a majority of that Congregation being of a different denomination, refused to permit a Minister of the Associate Seceding Party, to officiate in their Church. It was held that a trust resulted, although the Associate Seceding Party offered to build another Church near the one mentioned by the testator.

The Plaintiffs *McAuley* and *Beard*, as " Trustees of the Congregation of Gilead," filed their bill, in which they averred that *William Henderson*, in company with several other persons, in the year 1791, erected a Meeting House at the place described by him in his will, hereinafter set forth; that the land upon which the Church was built, was conveyed to *William Henderson* and others, in trust for the members of the *Associate Reformed Synod*, belonging to the Presbyterian Congregation of Gilead. That some time after the erection of the Meeting House, *Henderson* and others, who had contributed to build it, separated from the communion of the Associated Reformed Synod, and became members of a religious society called the Associate Seceding Presbyterians. That after this separation, the Congregation of Gilead became divided into two societies, one called the Associate Seceders, and the other the Associate Reformed Seceders. That as the Meeting House was built at the joint expense of both these denominations, it was agreed between them that each might use it for the purpose of public worship.—That *Henderson* duly made and published his last will, and appointed the Defendant *Wilson* his executor, who proved the same. That thereby, among other things, he devised as follows:

"The tract of land that I now live on, lying on the Catawba River, containing three hundred acres, and also fisheries, its my will and pleasure that my executors hereafter named, do within six months after my decease, cause the aforesaid tract of land to be sold to the highest bidder, (he then directs the notice of the sale, and the terms, and the security to be taken) and my will is, that the money accruing from the sale of the land, shall be laid out in purchasing shares in the State Bank of North Carolina, or purchasing shares in the United States Bank, and the profits to go towards paying a Minister of the Gospel who shall preach at the Seceding Congregation Meeting House, called Gilead, in said county, on the great road leading from Charlotte to Beattie's ford, *the party called the Associate Seceding Party*."

—That the Plaintiffs had been duly elected trustees of the *Associate Seceding Congregation*, who they contended were entitled to the use and occupation of Gilead Meeting House, equally with the Associate Reformed. But if in this they were mistaken, they stated that they had procured a conveyance to them, as Trustees of the Associate Seceding Congregation of Gilead, of one acre of land, and were about to erect upon it a house for the use of that congregation, within six poles of the Meeting House described by the devisor in his will.

The prayer of the bill was for an account, and that the charity created by the will might be established, and the interest of the fund be paid to the Plaintiffs to support a Minister to preach in the old Meeting House, or that the trusts of the will might be executed, *cy pres*, by appropriating the interest of the fund to the support of a Minister to preach in the new Meeting House.

The Plaintiffs *John Henderson* and others, were the heirs at law, and next of kin to *William Henderson*. In their bill they set forth the above clause of their ancestor's will. They averred that the land on which the Meeting House at Gilead was built, belonged to the *Associate Reformed Presbyterians.* That the *Associate Seceding Presbyterians* did not exist as a body at Gilead, and had no right to the use of the house. They insisted that there was no possibility of carrying the devise into effect, and prayed for an account of the trust fund, and that the executors might be directed to pay it over to them.

The Defendant, the executor of *William Henderson*, in his answers, admitted a sale of the land mentioned in the will, for the sum of 7,440 dollars, rendered an account, and submitted to any decree, by which he would be indemnified and protected.

Replications were filed, and testimony taken, explanatory of the differences between the Associate Seceding and the Associate Reformed Churches, and of the separate existence of both.—Attached to one of the depositions was an exhibit in these words:

"Gilead Church, July, 1823.

"At a meeting of this Society, agreeably to public notices given for that purpose, Resolved, that this Church be newly roofed and securely enclosed, with iron fastenings to the windows, doors, &c., and that this Church or Meeting House be kept for the sole and exclusive use of this congregation and our present Pastor, or some Minister of the Associate Reformed Synod. And that our present session or Elders are authorised and required to have the sole direction of this business."

The cause was argued at June Term, 1827, by *Gaston* for the Plaintiffs *McAuley* and *Beard; Wilson* and *Badger* for the heirs, and *Seawell* for the executor.

CUR. VULT ADV.

HENDERSON, Judge.—This is not a devise to a religious congregation, within either the words or the spirit of the Act of 1796, (*Rev. Ch.* 457.) The property it not given to the congregation, to be used by them as they may think proper, for their use and benefit; but it is given for a special purpose, in which, to be sure, they are interested, but are not the owners, to-wit: to pay a preacher of a certain sect, to preach to the congregation called Gilead. They take therefore as trustees, or *cestui que trusts*, (which is matter of indifference, the objection not being to the form) for a specific purpose, and are bound to apply the funds to that, and to no other use.

The validity of the devise depends on the question, whether the devisee are accountable to any one, for the due execution of the trust; for if they are not, it is void, and there is a resulting trust for the heirs at law, or next of kin. If there is any one who can compel the due execution of the trust, that is, the proper application of the trust fund, according to the directions of the devisor, then it is a valid trust, at least so much of it as is necessary to answer the intent of the founder. If there be more than is necessary for that purpose, the excess results to the heirs at law, or next of kin. For we do not, as they do in England, apply it to other objects of a similar kind, by what is called the doctrine of *cy pres*.

We are relieved from the consideration of the question, whether there is in this case, any person competent to enforce the due execution of the trust; for we think that those for whose benefit it was intended, have refused, and still impose it on them, for the congregation have the right to em refuse, to accept the testator's bounty. We certainly cannot ploy their own preacher, and to pay him in their own way. The testator has left us no guide to ascertain what is to be done in such an event. Nor do we know, but from conjecture, whether as the congregation, who have the appointment of the Minister and the control over the Church at Gilead, have refused to accept his bounty, it was his desire that it should be given to a part of the congregation who accord with him in religious sentiments, and who are willing to build another Church *near to the Church at Gilead,* and employ the funds in paying a preacher of that sect, directed by the testator. It is very probable that the testator would have directed this, had he foreseen the refusal, as the thing next best to that which he most wished. *But he has not said so*, and it is out of the power of this Court to speak for him. We cannot dispose of the property of the decease by undertaking to conjecture what would have been his will, provided he had foreseen what has since happened, which has thwarted his intent as expressed. If I was left to *conjecture*, I would say such was his will, but my argument to prove it would result in nothing like certainty. It would be this, that as the thing offered to be substituted, bears a very strong resemblance to that directed, which cannot be performed, it is probable he would have accepted the substitute, because it comes near to the thing directed. But it may be, that every circumstance in which the proposed substitute, differs from the original directed, may have been the testator's sole object in making the bequest, viz: wish to have a preacher of his tenets to preach to the whole congregation at Gilead, and thereby bring them over to his faith, and prevent the dissemination, in that Church of what he deemed unsound doctrines. I do not say that most probably this was his intent; it is sufficient if it *may* have been, or anything else but the precise proposition made by the Plaintiffs. If I were left to my own conjectures, I would say that in the event which have happened, the proposition made by the Plaintiffs, is the thing which he would have directed; for it is fair to presume that his object was the dissemination of the doctrines of his faith; that he selected the Church at Gilead as the place of preaching, and the congregation there as the one to be preached to; but that they were pointed out only as the means of effecting the end. But if these means failed, the ends was not to be lost, but the next best means, and those bearing the strongest resemblance to those pointed out, should be resorted to. This reasoning is all fair, and if we were correct in the object, would be satisfactory ground for a decree in favor of the Plaintiffs. But when we recollect that we assume the object which he had in view, that it is incapable of proof, for he who only can speak in regard to it has spoken for the last time, by this his last will, to which only we can look for his intent, and on this subject that he is silent, we must remain in ignorance of his intent further than he has declared it, and this furnishes only ground of conjecture, on which we cannot act.

HALL, Judge.—It would seem, that the object of the testator was to reconcile and unite in principle, the two sects, one of which was called " The Associate Seceding Party," the other " The Associate Reformed Party." To the first party the testator belonged ; the Church of Gilead belonged to the latter. The testator directs that his property shall be formed into a fund to pay a Preacher of his own religious principles, to preach at the Church of Gilead. That Church have rejected any benefit that intended for them by that devise ; they will not accept of it. The testator's own party, the Associate Seceding Presbyterians, pray the benefit of it, and that it may be vested, *cy pres*, in a Church erected by them very near to the Church of Gilead. This we think cannot be done ; as the object of the testator cannot be effected, we cannot direct the fund to be applied to any other.

PER CURIAM.—Let the bill of the Plaintiffs, *McAuley* and *Beard*, be dismissed, and on the bill of the heirs at law and next of kin, let an account be taken, and let all costs be paid out of the fund.

MEMORANDA.

At a meeting of the Executive Council, called on the 30th day of July last, for the purpose of filling the vacancy in the office of Attorney General, caused by the death of *James F. Taylor, Esq.*, *Robert H. Jones, Esq.* of Warrenton, was appointed *ad inter im*, and at the last session of the General Assembly, *Romulus M. Sanders, Esq.*, of Salisbury, was elected to that office.

On account of his severe indisposition, Chief Justice Taylor, was prevented from filing any opinions in the causes decided at this term.

EQUITY CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

NORTH-CAROLINA,

JUNE TERM, 1829.

Alexander S. Field, Adm'r. of Charles G. Field, *v.* Wm. & Thos. B. Eaton, Ex'rs. of Thos. Eaton. } From Warren.

A testator bequeathed a large estate, in land and slaves, to his son, and by a subsequent clause of the same will, gave one of the same slaves to his daughter. *Held* that the legatees took the slave by moieties.

The son claimed the slave by a gift prior to the will; but as he had taken other property under the will, *held* that he had made his election, and could not claim against it.

There being no *latent* ambiguity, but plain contradictory bequests, *held*, that parol evidence was inadmissible to prove the testator's intention to give the property to the son.

Where there is no *latent* ambiguity, but plain contradictory bequests, parol evidence of the testator's intention is inadmissible.

The bill was filed in the year 1817. The original parties to it were *Charles G. Field* and *Harriet* his wife, Plaintiffs, and *William* and *Thomas B. Eaton*, Executors of their father *Thomas Eaton*, Defendants. During the pendency of the suit, the original Plaintiffs died, and it was prosecuted in this Court by the Plaintiff *Alexander S. Field*, as Administrator *de bonis non*, of *Charles G. Field*.

The facts admitted by the pleadings were, that the testator of the Defendants, by his will, gave a large estate to his son, the Defendant *William*, consisting of lands and slaves—among the latter was a female slave by the name of *Sal.* In a subsequent clause of his will, the testator gave the same negro to his daughter *Harriet*, the wife of the original Plaintiff *Charles G. Field.* Both bequests were in the same words, viz. "Sal and all her increase since 1804." The Defendant *William Eaton*, in his answer, claimed the girl *Sal* and her increase, under a parol gift made before the year 1804, and insisted that it was the intention of the testator to confirm the prior gift to him, and that the mention of her name in the gift to *Harriet*, was a mistake. Evidence of the testator's intention was taken and filed, but it is unnecessary to give a statement of it, as it was deemed inadmissible.

Badger, for the Plaintiff, upon the effect of the contradictory bequests, cited *Coke Lit.* 112, *b. note* 1. *Paramore* v. *Yardly* (*Plowd.* 541.) *Wykham* v. *Wykham* (18 *Ves.* 421.) *Ulrick* v. *Litchfield* (2 *Atk.* 373.) Upon the incompetency of the evidence, also he cited *Ulrick* v. *Litchfield.*

Seawell, contra.

Toomer, Judge.—His Honor (after stating the facts admitted by the pleadings, proceeded) there is undoubtedly a contradiction, and repugnancy in the bequests contained in this will. The testator first gives *Sal* by name to his son *William.* He then gives her in the same way to his daughter *Harriet.* The inquiry is, what was the intention of the testator, as it is to be collected from the face of the will. If such an intention can be ascertained by looking at the will, and it be in violation of no principle of law, it is the duty of the Court to give it effect. In the construction of wills, the testator's meaning is to be discovered from the will itself, taking in aid the general rules of construction, established by former decisions. (*Noel* v. *Western*, 2 *Ves. & Bea.* 271.) In cases of such direct contradiction and absolute repugnancy, the intention of the testator cannot be discovered from the face of the will.

It is manifest, the chattel was *intended* for one or both of the legatees; it is not one of those cases, in which the bequest is void for uncertainty. It is then necessary to establish some rule of construction, prescribing who is under such circumstances to take the legacy, and in what manner, in order to preserve the peace of society, and to prevent future litigation. If we cannot ascertain the *intent* of the testator, by looking at the will, we next inquire what construction the law has imposed on such inconsistent bequests? In such case no rule of construction has been established in this State. We must then resort to the adjudications of that country, from which the elementary principles of our system of jurisprudence have been derived. *There* we find a great contrariety of opinion. Some thought, that both devises were void for uncertainty. (*Owen* 84.) Lord *Coke* held, that in two different devises of the same thing, the last should take place; others have concurred with him in saying, that the second devise revokes the first. (*Cruise Dig. Tit. Devise, Ch.* 9, *Sec.* 22.) In *Paramore* v. *Yardly*, (*Plow.* 539, 541,) it is said, the legatees shall take as joint-tenants. Of this opinion was *Swinburne*. In *Ulrick* v. *Litchfield*, (2 *Atk.* 374,) Lord *Harwicke*, referring to the case of *Paramore* v. *Yardly*, said, "the reasoning in *Plowden* is not convincing to me. I rather incline to Lord *Coke's, though the latter cases have taken it otherwise.*" In *Ridout* v. *Pain*, (3 *Atk.* 493.) Lord *Hardwicke* again says, "the law presumes that a testator, even in making his will, may vary his intention. As suppose a man gives a farm in Dale to A and his heirs in one part of his will, and in another to B and his heirs, it has been held by the *old books* to be a *revocation;* but latterly construed either a *joint tenancy*, or *tenancy in common*, according to the limitation." The opinion supported by the greatest number of authorities is, that the two devisees shall take in moieties. (*Coke Litt.* 112, *b. note* 1—*Cruise's Dig. Devise Ch.* 9, *Sec.* 22—*Paramore* v. *Yardly, Plowden* 541—*Anonymous. Cro. Eliz.* 9—*Coke* v. *Bullock, Cro. Jac.* 49.) If a thing be given in one part of a will to one and in another part to another, the devisees shall take in moieties. (*Edwards* v. *Symons*, 6 *Taunt.* 361.)

I shall not attempt astutely to assign the reasons of these conflicting opinions; nor shall I *vainly* attempt to reconcile them. Distinguished jurists of modern times, with all the wisdom of former ages, and all the lights of experience before them, have sanctioned the opinion expressed in *Plowden*, that the devisees shall take in moieties: rejecting the old doctrines, that the devisees are void for uncertainty; and that the latter devise is a revocation of the former. I shall adopt the modern opinion, and declare that these legatees take in moieties; solacing myself with the reflection, if it be erroneous, that it is the accepted opinion of modern times—is supported by the greatest number of authorities—and has the sanction of distinguished names.

The Defendant *William Eaton*, alleges, that *Sal* had been given to him, and put in his possession by the testator, in the year 1803 or 1804, long anterior to the making of the will, was his property when the will was executed, and the testator had no right to dispose of her by his will, and has filed several depositions to establish that fact. But it appears that *William Eaton* has taken a large estate under the will, and has thus made his election.

The general rule is, that a person cannot reject and except the same instrument—he cannot claim under and against it. It is a rule of law as well as of equity, and applies to every species of instrument, whether a deed or a will. (*Birmingham* v. *Kirwan* 2 *Scho.* and *Lef.* 449). A person shall not claim an interest under an instrument, without giving full effect to it, as far as he can, renouncing any right or property, which would defeat the disposition made in the will. The ground is the *implied condition*, upon *intention*, though from mistake. (*Thellusson* v. *Woodford*, 3, *Ves.* 220.) A condition is *implied*, either that the devisee shall part with his own estate devised by the will, or shall not take the bounty of the testator, declared in the will. (*Broome* v. *Monck* 10 *Ves.* 600. *Andrew* v. *Trinity Hall*, 9 *do*. 533.) He shall not defeat the disposition made by the will, and yet take under that instrument. He must make his election. *Here*, the Defendant *William Eaton* has made his election, and has taken a large estate under the will. He cannot now deny the right of the testator to bequeath *Sal*, but must submit to that disposition of her, which has been made by the will.

It is contended, that the testator, in bequeathing slaves to the Defendant, which had been given him, long anterior to the making of the will, *did not intend* to interfere with Defendant's rights under the antecedent gift; and a deposition has been filed to show such intention. But Defendant has taken a large estate under the will, including much property to which he had before no title. He has thus made his election, and cannot take both under and against the will. This is a conclusion of law, founded on the doctrine of election. It is not necessary now to enquire, whether the Defendant can contradict this conclusion by parol testimony; or whether he be not estopped from denying it. This is not the point of difficulty in the case. The same slave has been bequeathed by one clause of the will to *William*, and by a subsequent clause to *Harriet*. The purpose of introducing the parol testimony is, to show that the testator did not intend to bequeath any interest in *Sal* to the legatee *Harriet*, and thus defeat the bequest to her. Such evidence will be contradictory to the plain language of the will. The law excludes, from principle and policy, the introduction of parol evidence, to contradict or alter instruments of writing. They are presumed to be repositories of truth. Principle prohibits it, because such instruments are, in their nature and origin, entitled to higher credit, than that which appertains to parol evidence. Policy forbids it, because it would be followed by mischievous and inconvenient consequences. (3 *Stark. on Ev.* 995.) The law permits the introduction of parol evidence to explain some cases of ambiguity in instruments of writing. *Latent* ambiguities, such as are not apparent on the face of the instrument, may be explained by parol testimony. But such evidence is inadmissible to explain a *patent* ambiguity, one apparent on the face of the instrument. (3 *Starkie on Ev.* 1000.) There is a repugnancy in the bequest of the same slave, in one clause to *William*, and in a subsequent clause to *Harriet*, but no ambiguity, and if it be called an ambiguity, it is *patent*, apparent on the face of the instrument; and by the settled rules of law, not susceptible of explanation by parol evidence. It cannot be competent for *William*, to contradict by parol testimony the intention of the testator, as is plainly expressed in his written will; to contradict the plain language of that will, and thus defeat the bequest to *Harriet*, and deprive her of that property which she claimed by a paper title. It is not believed that parol evidence is admissible to show, that the testator did not *intend*, what he plainly declared in his will. *Lord Hardwicke* says, in *Ulrick* v. *Litchfield*, (2 *Atk.* 373) that upon the construction of a will, Courts of Law and Equity admit parol evidence, only in two cases—first, to ascertain the person, where there are two of the same name, or where there has been a mistake in a christian or sirname; the second case is, with regard to resulting trusts relating to personal estates.

These are cases of latent ambiguity—there are others which are embraced by the same principle.

PER CURIAM.—Declare the Plaintiff and the Defendant *William*, to be entitled to the slave and her increase, in moities, and direct an account of the profits of their labor.

—o—

John Peace, Adm'r. of
John Dickinson,
v.
William Nailing et al.
} From Granville.

A Court of Equity will not relieve against a judgment at law, unless the Defendant was ignorant of the fact in question pending the suit, or it could not be received at law, as a defence.

Courts of Equity do not allow appeals to them merely to obtain a new trial. And where a party, on being sued at law, attempted to establish a legal defence before the jury, and was unsuccessful, he cannot, on the same facts, obtain relief in Equity.

The bill alleged, that administration upon the estate of one *Frances Chaves*, was committed to the Defendant *Smith*, who gave the Defendant *Nailing* and one *Pope*, as sureties for the due administration thereof—that the estate was sold by the administrator on the 24th of Feb., A D. 1785—that two negroes were then purchased by one *John Dickinson*, for £132 10s. who gave bond to the administrator for the purchase-money, which bore date the 24th of February, A. D. 1785, and was payable six months thereafter. That the bond of *Dickinson* was delivered on the next day by *Smith* to *Nailing*, to indemnify him for his liability on the administration bond, and was endorsed by the obligee. That on the 15th of August, 1785, before the bond was payable, and while it was held by *Nailing*, *Smith* gave *Dickinson* a receipt, stating it to be in full satisfaction of the bond; but which was not surrendered to the obligor. That *Dickinson* died in April, 1802, and administration of his estate was granted in November, 1806, to the Plaintiff. That suit was brought on the bond in the fall of 1806, in the *name* of the *obligee*, against the Plaintiff, as *executor de son tort* of *Dickinson*. That the Plaintiff made the best defence in his power, but a verdict was obtained against him in March, 1808, for the full amount due on the bond. That he offered in evidence the above described receipt, and such other proof as he had it in his power to command; but the Court protected the endorsee, because the presumption created by the endorsement was not, nor could it then be repelled by the Plaintiff's proof. That after the trial at law, he learnt from one *Mills*, that no other consideration was given for the endorsement of the bond, than that which has been already stated; and that *Nailing* had never suffered in any way by his suretyship, and was not likely to suffer. The bill was filed on the 12th of April, 1808, and prayed for an injunction to restrain proceedings on the judgment at law, and for general relief. At September Term, 1808, "the injunction was dissolved with costs;" and on motion of the Plaintiff, the cause was continued, and held over as an original bill.

Ruffin, with whom was *Devereux*, for the Defendant, moved to dismiss the bill, upon the ground that there was complete relief at law, and cited *Gatlin* v. *Kilpatrick*, (1 *Car. Law Repository* 534.) *Fentriss* v. *Robins*, (*N. C. Term Re.* 17.) *Floyd* v. *Jayne*. (6 *John. Ch. Rep.* 479.) *Simpson* v. *Heart*, (14 *John. Rep.* 63.)

Winston, *contra*.

Toomer, Judge.—After stating the facts of the case, as above, proceeded—It is moved to dismiss the bill for want of equity. For the purposes of this motion, the allegations of the Plaintiff are taken to be true; and no other part of the pleadings is looked into. With this concession, it is insisted by the Defendants, that the Plaintiff is not entitled to the interference of this Court, On application for equitable relief, it is not sufficient to show, that injustice has been done. It must also be shewn, that the Court will be warranted in exercising its power. Equity does not interfere, on the ground that an unconscientious verdict has been obtained at *law*, unless it were not competent to the complaining party, to make his defence in a Court of Law. (*Bateman* v. *Wilcox*, 1 *Scho.* and *Lef.* 201—204.—*Jones* v. *Jones*, *N. C. Term Rep.* 110.) A the allegations of the bill are taken to be true, the transaction may be viewed, as if the money due on the bond had been paid by *Dickinson* to *Smith*, on the 15th of August, 1785, however improbable it may be, that the payment was then made. The bond had not become payable; it was then in possession of *Nailing*; no notice of payment was given to him; the surrender of the bond not required by the obligor; the receipt not setting forth what had been received in payment, but simply stating, "received in full satisfaction of the bond, &c." These circumstances are well calculated to excite suspicion that payment had not been made; and that some contrivance was designed, to deprive *Nailing* of the security on which he relied. But these presumptions are all waived. It is now conceded that the bond had been paid; and it is clearly unconscientious to enforce payment a second time for the same debt. Can this Court, under these circumstances, interpose to prevent this act of injustice? Relief cannot be extended, if it were competent to the Plaintiff to make his defence at law.

The action was brought on the bond, in the name of the obligee, against the Plaintiff, as *executor de son tort* of the obligor. If payment had been made on the 15th of August, 1785, as is alleged in the bill, that defence would have availed the Plaintiff at law. The suit was brought on a sealed instrument; payment at the day might have been pleaded, and the receipt, although without seal, could have been given in evidence to support that plea. This principle has been sanctioned by the uniform practice of our Courts of Law. (*McDowell* v. *Tate ante* 1 *vol.* 251.) I do not know that the correctness of this practice has ever been questioned in our Courts; nor was it doubted in the case now under consideration, so far as we can discover from the bill. The right of the obligor to prove by *parol*, the performance of the conditions, and payment at the day, and thus to discharge himself from the obligations of his deed, has not been denied. Tender and refusal are facts, which can only be proved by parol; and when made on the day, if the money be brought into Court, and the plea of tender and refusal be supported by parol proof, it will defeat the action of the obligee. If the obligation be not for the payment of money, but for the performance of some collateral act, requiring the concurrence of the obligee, and there be an offer by the obligor to perform, and the performance be prevented by the obligee, which are facts only to be proved by parol, such proof will discharge the obligor, although bound by deed. (*Mitchell* v. *Patillo*, 2 *Hawks*, 40.) It has also been understood, that the statute of 4 *Ann*, *Ch.* 16, *Sec.* 12, which allows the obligor, when sued in debt on a single bill, to plead payment in bar, is in force in this State. This has been the uniform understanding of the profession, and it has governed their practice. But if the old principle of the common law be contended for, that when the action is brought on a deed, it can only be avoided by matter of *as high a nature*, as by an acquittance under seal; and that the statute of 4 *Ann*, is not in force here; still it is insisted, complete defence could have been made at law, either on the plea of payment at the day, condition performed, or accord and satisfaction. The bill does not state the character of the specialty, but speaks of it as the bond of *Dickinson;* from which it is to be inferred, that it was a penal bond, conditioned for the payment of £132 10s. six months after date. Were it a penal bond, the plea of "payment at the day" would have been good at common law, for it is the performance of the condition. (*St. Germain's Doctor and Stud.*, 107.) Payment before the day could be given in evidence, and the money would be considered as a deposit in the hands of the obligee, till the day of payment arrived, when it would, in legal contemplation, be applied. (7 *Mod. Rep.* 231.) The plea of condition performed, would have answered the like purpose. (*Anonymous, Croke Eliz.* 46.) Had the obligor paid money or other equivalent, when the receipt was given, and it had been accepted by the obligee, in full *satisfaction* of the *condition* of the bond, then the obligor would be protected, under the plea of "accord and satisfaction." That payment was *made* and *accepted* in full satisfaction, is averred in the bill. As the condition was performed before the day, if less than the sum due were paid and accepted in full satisfaction, it would be a discharge. Because part of the debt before the day, may be more beneficial to the obligee, than the whole at the day. (*Pinnell's case*, 5 *Rep.* 117. *a.*)

It is not alleged in the bill, that the Plaintiff did not make defence at law. He avers that he made all the defence in his power, and that he gave the original receipt in evidence, to show that the bond had been paid by *Dickinson*. It is not pretended by the Plaintiff, that he was met by any technical difficulties, which prevented an investigation of the case on its merits.

Equity ought not to interfere, when adequate relief might have been had at law. Were the verdict improper, a new trial could have been granted by the Court of Law. This appears to be an application to a Court of Equity to grant a new trial, in a cause which had been tried in a Court of Law, that had ample power to grant full relief. Courts of Equity are not instituted to correct the errors, or revise the judgments of Courts of Law. (*Fentress* v. *Robins*, *N. C. Term Rep.* 177.) This is an attempt to obtain two trials, in different forums, of the same question; first taking a chance at Law, and then appealing to Equity. There must be some end to litigation. If injustice had been done the Plaintiff at law, he could have appealed, or have procured a *certiorari*, and had the judgment of the Court below revised, by a Court of superior jurisdiction, possessing common law powers, and constituted for the purpose of correcting such errors. (*Gatlin* v. *Kilpatrick*, 1 *Car. Law Repository*, 534.)

The act of the General Assembly, organizing a Court of supreme jurisdiction, was passed in 1799; and a Court possessing such powers, has been since continued. The Plaintiff could have had the alleged errors revised by an appeal to the common law side of this Court, without invoking the exercise of Chancery powers. Relief is not given in Equity, because there has been an omission to make defence at law. (14 *Ves.* 31—1 *Johns. Ch. Rep.* 51.)

But there has been no such omission. The defence was made in a Court of competent jurisdiction, and was overruled. This circumstance will not justify the interference of a Court of Equity. (2 *Johns. Rep. Ch.* 557.)

The Plaintiff alleges, that he seeks relief in this Court on the ground of newly discovered evidence; that he did not know, until after the trial at law, that the bond had been placed in *Nailing's* hands, only to indemnify him for his liability, as surety of the obligee, and was endorsed to him without any other consideration. It is to be inferred from this allegation, that the obligor knew, at the time he procured the receipt from the obligee, that *Nailing* held the bond. Ignorance of this fact is not pretended, and certainly the obligee not having possession of the bond, was sufficient to put the obligor on inquiry, and to prevent his paying it, until he could obtain its surrender. It is not intimated that the obligee concealed from the obligor, at the time of the alleged payment, that *Nailing* had possession of the bond: and it must be inferred from the circumstances, that the obligor well knew, or had very good reason to believe, *Nailing* claimed some interest in the bond. Why then did the obligor make payment to the obligee? Were it with any design to defeat *Nailing's* claim, the Plaintiff, who represents the obligor, comes with ill grace into this Court. It is not alleged, that any artifices were resorted to, either by *Nailing*, or the obligee, to deceive the obligor. To view the transaction most charitably, it was an act of gross negligence, or extreme folly, on the part of the obligor, which gives him no claim to the interposition of this Court.

The Plaintiff sets forth no reason, why he could not have discovered this new matter, by the exercise of ordinary diligence, as well before, as after the trial at law. But the discovery of this evidence, and its exhibition on the trial, could have been no defence for the Plaintiff. The jury, by giving a verdict for the obligee, must have come to the conclusion, that payment had not been made, and that there had been no accord or satisfaction; which conclusion must have been founded on the belief, that the receipt was spurious, and not the act of the obligee. The Plaintiff could have gained nothing by showing, that the obligee had the beneficial, as well as the legal interest in the bond.

The endorsement of the bond to *Nailing*, was only the assignment of a *chose* in action, which vested in him no legal rights, and his interest would not be noticed in a Court of Law. The assignment was made in February, 1785. The act making bonds for the payment of money negotiable in this State, was not passed until December, 1786. A bond, not negotiable at the time of its execution, does not become so by subsequent occurrences. (1 *Hay. Rep.* 372, 398.) The act of 1786 had no retrospective operation; it did not embrace bonds made before its enaction. Suits on such bonds must be brought in the name of the obligee; the assignment could not clothe the assignee with any legal rights (*Wilkinson* v. *Wright. Conf. Rep.* 342.) Our Courts of

Law only consider legal rights. (*Jones* and *Wife* v. *Blackledge*, 2 *Carolina Law Repos.* 457.)

The action was brought in the name of the obligee; the legal right was clearly in him. On the plea, that the bond had been paid at the day, or on the plea of accord and satisfaction, made and accepted by the obligee, the question could not arise in a Court of Law, whether the assignment had been made with or without consideration. If any question of fraud had incidentally arisen on the trial, that Court was competent to its decision.—It was not necessary to the defence of the Plaintiff, to show that the bond had been assigned without consideration. That Court would not inquire, who was beneficially interested in the suit, but would look only to the legal rights of the Plaintiff in the action. It is said, the Court protected the assignee, on the ground that the assignment was evidence of its having been made for valuable consideration. If the Court of Law, which tried the cause, inquired into the equitable rights of the assignee, and deemed such an inquiry material to the issues joined, it is believed to be a mistake, and it carried the Court "*out of the record.*" And such error gives the Plaintiff no title to the interference of a Court of Equity. He could have moved for a new trial, or he could have had the error corrected, by the adjudication of a Court of appellate jurisdiction, possessing common law powers. No Court aspires to infallibility, or claims exemption from error. Human institutions partake of human imperfection. Perfect justice is not to be expected from imperfect tribunals.

The bill must be dismissed; each party paying his own costs.

HALL, Judge.—I suppose it was competent for *Peace* to pray a discovery from *Nailing*, whether he had any interest in the obligation on which suit was brought. But that mode of defence having been resorted to, and turning out fruitless, the bill ought to have been dismissed, and not held over as an original, as was too often permitted to be done by Courts of Equity at the time this was filed.

By holding the bill over and taking testimony, it was intended to examine a second time the same subject, which had been examined and disposed of in the Court of Law—to have a new trial—when the Plaintiff had no equitable matter in his bill, which entitled him to it. For that purpose testimony has been taken by both parties, and the suit has remained upon the docket twenty years. I have examined the testimony, not for the purpose of ascertaining whether the bill should be dismissed or not, (for I think it ought to be dismissed, independently of any testimony,) but to ascertain how the costs should be disposed of, and as far as I can discover, the merits of neither party entitle them to costs. Nothing but the endorsement on the note, and *Nailing's* answer, show that he had any interest in the note ; indeed there is reason to believe the contrary. On the other hand, whether he had any real interest in the note or not, *Dickinson* knew that the note was assigned to him, before the paid the money to *Smith*

For these reasons, I think neither party entitled to costs, but that each should pay their own. I suppose the suit's remaining on the dockets so long, was owing to a common error.

Per Curiam.—Let the bill be dismissed without costs.

Ann Stallings et al.
v.
Isaac Stallings et al.
} From Johnston.

The second *proviso* to the third section of the act of 1806 (*Rev. c.* 701) respecting parol gifts of slaves, applies to the whole act, and is prospective in its operation.

By that *proviso*, parol gifts of slaves to children are validated by the death and intestacy of the parent, without resuming the possession; and become effectual from the time the slaves were delivered to the children.

Where slaves were delivered to a child, and remained in his possession until the death of the parent intestate, it was held to be an advancement at *the time* of the delivery, and the subsequent increase was not to be valued in making distribution of the parent's property, nor to be taken as an advancement to the child.

The case of *Davis* v. *Brooks* (3 *Murph.* 133) approved by Henderson, Chief-Justice.

This was a petition for an account of the personal estate, and a division of the negroes of one *Zadock Stallings*, who had died intestate.

A division of the latter had been made, under an order of the County Court, upon the principles mentioned in a case agreed, which was submitted to his Honor Judge Strange, on the last Spring Circuit, and which was as follows:

" The intestate *Zadock Stallings*, in his lifetime, put into possession of several of his children, the negroes mentioned in the schedules filed by them, and which have been taken into the account of the division of the negroes of which the intestate died possessed. That the said *Zadock* executed no deed or other written evidence of the transaction, upon his sending the said slaves to the houses of his said children; and that no express gift of the said slaves was made by the said *Zadock* to the said children, but that the said slaves were put into the possession of the said children, in the ordinary manner in which slaves are sent to the younger members of a family upon their settlement life. That the said *Zaodck* never resumed the possession of any of the said slaves, but that they remained in the possession of the said children until the death of the said *Zadock*. That during the possession of the said slaves by the said children, and before the death of the said *Zadock*, the said slaves increased in number and value, which increase had not been estimated in dividing the slaves of which the said *Zadock* died possessed, as an advancement made to the said children by the said *Zadock* in his lifetime."

Upon this case, his Honor pronounced judgment confirming the division made under the order of the County Court, from which the children who were not advanced, appealed to this Court.

Seawell and *Gaston*, for the Plaintiffs.—The act of 1806, provides " that when, the said slave or slaves shall remain in the possession of such child or children *at the time* of the death of such person, (he or she dying intestate,) such slave, &c. shall be considered as an advancement to such child or children, and be regulated by the laws now in force relating to advancements made to children, by a parent in *his lifetime*.

The Judge who decided in this case below, appeared to entertain no doubt upon the point, and in pronouncing his judgment stated, that the peculiar phraseology of the act placed the question beyond all difficulty. The particular clause in the act adverted to by his Honor, was the concluding part of it, which declares, that " such slave, &c. shall be considered as an advancement, &c. and be regulated by the laws now in force relating to the advancements made to children, by a parent in *his lifetime*."

With all becoming respect for his opinion, and with due deference to the reasons upon which it is grounded, we arrive at a directly contrary conclusion, from the phraseology of the same part of the act. It may well be questioned whether this esection of the act is not retrospective altogether. In the first place, it is perfectly clear, that no interest passes by the act of putting in possession—that was the very thing the act intended to prevent—it intended to abolish parol gifts. It is the possession of the child *at the death of the parent* , and the intestacy of the parent, which united, make it an advancement; not an advancement in the life of the parent, that could not be, for it is *by* his death that it becomes an advancement; and the words "regulated, by the laws relating to advancements made to a parent in his *lifetime*," are to declare that this advancement, made *after his death*, is like an advancement in his *lifetime*, to be brought into hotchpot. The property so put into the possession of the child, remains, during the life of the parent, the absolute estate of the parent—he can sell it, it is liable for his debts, he may bequeath it away, and it is to all intents and purposes his. The meaning of the Legislature is obvious, that the not making of a will by the intestate, under the circumstances of the possession, is to be regarded as having the effect of a legacy, but declaring that it should be brought into hotchpot. Now it is admitted, as a well established rule, that the value of the advancement is to be estimated at the time when it is made, because the child may then sell it, it gives him credit, and if it dies, or is destroyed, still being his property, he must account for it. When, then, did this property become an advancement, so as to enable the child o sell? The answer is, at the death of the intestate. Then the conclusion follows, its value at that time, is to be estimated.

There is another ground upon which this point can be placed, which is decisive of the question. By this construction, perfect equality is attained; and if the matter is not clearly defined by the Legislature, so as to admit of no doubt, as the object in all instances of hotchpot, is equality, the Court will so construct it, as to effect this end. The reason why subsequent value, or increase, in the case of an advancement during the life of the intestate, is not to be regarded, is that by the gift, the property changes, and the increase afterwards accrues, when it is the property of the donee.

It must be perfectly clear, that under this act, slaves which died in possession of the child, after being put into such possession by the parent, are not to be regarded as advancement, because the possession did *not continue* until the parent's death intestate.

Badger, with whom was *Devereux*, *contra*.

Hall, Judge.—By the act of 1766, (*Rev. Ch.* 79) which points out the method of distributing intestate's estates, it is amongst other things enacted, "that in case any child shall have any estate by settlement from the intestate, or shall be advanced by said intestate in his lifetime, by portions not equal to the shares, which shall be due to the other children, by such distributions as aforesaid; then so much of the surplus of the estate of such intestate is to be distributed to such child or children, as shall be advanced in the lifetime of the intestate, as shall make the estate of the said children to be equal, as near as can be estimated."

By the act of 1792, (*Rev Ch.* 364) it is declared, "that when any person shall die intestate, who had in his life time given to, or put in possession of any of his children any personal property, such child shall cause to be given to the administrator of such estate an inventory, on oath, setting forth therein, the particulars by him received of the intestate in his life time."

It appears to me, that the construction to be put upon the act of 1766 is, that advancements made by an intestate, ought to be valued at the time they were made, and not at the death of the intestate. But when the two acts are taken together, I think there can be no doubt but that this is the proper construction. The latter act expressly declares, that the child advanced shall give to the administrator, on oath, an inventory setting forth *the particulars by him or her received of the intestate in his lifetime.* It follows of course, as I think, that such particulars are to be considered the *advancements made,* and their value at the time, is to be regarded as *the amount of the advancements.*

The act of 1806, (*Rev. Ch.* 701) was made for the purpose of preventing frauds and perjuries in contests, respecting slaves claimed from parents under parol gifts. And although it invalidated all parol gifts, made to children, so that they could not thereby acquire title to slaves, yet if the parent suffered the child to remain in possession of slaves thus given, during his lifetime and died intestate, the act declared, that such slaves should be considered an advancement, and should be regulated by the laws then in force, relating to advancements made to children by a parent in his lifetime. The law intended to give the parent a power over property thus situated, but if he did not think proper to exercise it, the property should then be considered as an advancement made, as if that act had never passed.

When a child has been thus possessed of slaves, and retains uninterrupted possession, until the parent's death, what view of the property, as an advancement, does the act refer us to? Not to its situation at the parent's death, but to the possession of the property, when first taken, and continue as an inchoate advancement, completed by the intestate's death. It could not be comprehended before, because the act gave the parent the power of reclaiming it.

Considering it as an advancement, can there be any doubt, but that the child must deliver an inventory to the administrator, as the act of 1792 prescribes, setting forth therein the particulars by him or her *received of the intestate, in his or her lifetime;* not the slaves that he holds at the intestate's death.

I admit that cases of hardship may be supposed, whatever general rule may be adopted; as where one child receives a young female slave; antoher a valuable male slave, who may be a tradesman. But this only proves, that general rules will not suit all individual cases.

There is certainly no hardship or injustice in the consideration, that an advancement in the hands of an older child shall increase from the time he receives it, until the parent's death, and that it should be valued at the time he received it; because at the parent's death such child may also have a family, and be somewhat advanced in years, and a younger child, to whom the same advancement may be made at the father's death, that was made to the older in his lifetime, may, when he arrives at the same age, have as great an increase in his advancement, as the older child has at that time. This is equality, and of course justice.

I therefore think that the advancements, should be valued at the time they are received, and not at the time of the intestate's death.

HENDERSON, Chief-Justice.—Two questions are made in this case. First, is the second proviso to the third section of the act of 1806 prospective, or is it confined to gifts theretofore made. If it is prospective, at what time shall the slaves be valued? At the time they were put into the possession of the child, or at the time of the parent's death? The first question was decided in the affirmative by this Court, in the case of *Davis* v. *Brooks* (3 *Murp*. 133.) The last question has not heretofore arisen. Were we disposed to re-examine the first question, we see no reason to doubt the correctness of the decision in *Davis* v. *Brooks*. The proviso can only be confined to gifts theretofore made, by considering it to be a proviso confined to the third section, where it is placed, and not applicable to the first, or rather to the whole act, its spirit being contained in the first section. The proviso withdraws the case made in it from the operation of the rule created by the act itself, which case would have been within that rule, but for the proviso.—The rule prescribed in the third section of the act, relates to the time in which suits shall be brought on parol gifts of slaves, made before the passing of the act. The case made in this proviso could not have fallen within the operation of that rule, for that rule fixes the time within which those who are *out* of possession, shall bring their *actions*. The case made in the proviso is, where the claimant is in *possession*, and cannot bring an *action*. He therefore needs not the aid of the proviso to shield himself from the operation of the rule created by the third section, for it cannot reach him. Neither can the least reliance be placed on the phraseology of the proviso, thereby to confine it to past transactions. The legislature looked to the death of the parent, as a consummation of the transaction. The fact of placing the property in the possession of the child was only inceptive, looking to the death of the parent for its consummation. The expression "*shall have put*," was proper, to make the case intended to be embraced by the proviso, for the placing in possession, must necessarily have preceded the death of the parent. On the contrary, if the proviso is considered as withdrawing the case made by it from the operation of the first section, it is plain, sensible and intelligible. That section declares, that no gift thereafter to be made of any slave, shall be good, unless the same shall be in writing. The case made in the proviso is, a gift of a slave, and not in writing, which the Legislature declared should be good That can only be affected, by withdrawing from the operation of the first section, the case supposed in the proviso. It is therefore a proviso to that section, which being entirely prospective, the proviso has of necessity the same character, and is prospective also. Most usually, to be sure, a proviso is to be taken as an exception to, or as belonging to the section in which it is found. But this is not necessarily the case; where, from its nature, it cannot form an exception to the rule prescribed in the section of which it is placed, it must be referred to some other part of the act. It cannotbe referred to that where it is placed in this case, for it there would lose its essential quality. I have been induced to go at large into this question, from the zeal wth which this point was pressed upon the Court, notwithstanding the case of *Davis* v. *Brooks*, and the general impression of the profession.

This case then presents the second question, above stated. t is the death of the parent intestate, which validates and makes good the gift. Without this requisite, the case would fall clearly within the first section of the act. With it, it stands confirmed, as if the act had never been passed. The act of putting the property into the possession of the child makes the gift, if it be not subsequently revoked, or (should the expression be preferred,) if consummated by the parent's permitting the slave to remain with the child, and dying intestate, either wholly, or as to the particular slave. For should a will be made, and the property thus given, not disposed of—that is, should the parent die intestate as to it, the case would be still within the proviso, so far as to make the gift good. For however we may be disposed to follow up the erroneous decisions of this Court on the question of advancements, and bringing into hotchpot, it is evident that there is no such thing as bringing into hotchpot upon a partial intestacy. When I say there is no such thing, I mean *that there should* be no such thing. The principle upon which hotchpot is founded is against it; and however the cases may stand, no analogies can be drawn from them. It is not a gift at the death, but at the time the slave was placed in the possession of the child, and the circumstances stated in the proviso are evidence, in the estimation of the Legislature equal to that which is required to a valid gift by the first section. The Legislature has placed both cases on the same ground. Were it not so, what is to become of the issue of the slave born afterwards, no provision being made by the act as to that ; it speaking only of the slaves placed in the possession of the child. The case so warmly pressed by the Plaintiffs Counsel, does not at all improve this construction, to wit : the withdrawal of the mother from the possession of the child. Its only effect would be, to prevent the operation of this proviso as to the mother ; it would leave her issue to be affected by it. Neither is it correct to say, that the property must be valued at the time the gift was perfected. It should be valued as it was when the parent intended to pass the property. The change of possession has the character of a gift ; but it wanted the evidence of intent, which the Legislature required by the first section, to make it valid, viz. a writing evidencing an intent to give. In the proviso, they substituted what they deemed equivalent to writing. The substitute did not consist of a single act, but of a series of acts. The property did not pass until all were completed. But when completed it was a gift, and a gift from the commencement. For the transaction is entire ; it cannot be divided. The first step is as necessary as the last ; all the parts compose the whole. To make it a gift only from the death of the parent, would be to disregard one of the most essential qualities of a gift, the delivery of possession. In the opinion of the Legislature, the mischiefs intended to be prevented by the first section, the setting up of spurious gifts by perjury and misconception, would not arise in the case within the proviso. They therefore, not only withdrew that case from the operation of the act, but validated it, and made it a good gift What was made a valid gift ? The delivery of possession—the only part of the transaction, which on its face, bore the character of a gift. The other circumstances are only evidences of that intent, and are in the nature of a confirmation, which relates back, and validates the act confirmed.

A contrary exposition would be attended with the most unjust consequences. Property is placed in the hands of two children, with one is placed a young woman, whose maintenance; with that of her issue, is a burden, far beyond the value of their services; with the other is placed a male slave in the prime of life. He is worn out entirely in the service of the child, and at the parent's death is worth nothing. If the property is to be valued as it is then, one child not only labors for the other, but for one who has already drawn largely from the stock on which he had no greater claim than the first. The elder children have also a claim to an advancement in the life-time of their parents, not generally adverted to, but equal to those of the younger. If a distribution of the whole of the parent's estate is postponed until his death, that is, takes place at the same time, the younger children receive equally with those whose claims have been long delayed, and which, to make them all equal, should have drawn something like interest or increase for the delay. The claims of children do not fall on the parent to the same amount at the same time, but at different times, in different amounts, according to their respective ages. The mode of valuing property, at the time the parent places it in the possession of a child, preserves this equality; the other destroys it. Upon the whole I consider this as an advancement made when the slaves were placed with the children, and like all other advancements to be valued, at that time, or when made.

PER CURIAM.—Let the decree be affirmed.

MEMORANDA.

It is our melancholy duty to announce the death of the Honorable JOHN LOUIS TAYLOR, late Chief-Justiceo f the Supreme Court of North Carolina. The fatal disease, which in the course of a few days removed him from the embraces of his family, from a society which he adorned, and a country which he had long and faithfully served, found him at his post, engaged in the discharge of the duties of his high office. He departed this life on the 29th of January, 1829, two days after the close of the last term of this Court.

In the character of this distinguished man there was such a rare union of qualities as renders the task of pourtraying it one of peculiar difficulty. No one property stood out in such bold relief, or disproportioned growth, as to afford to an ordinary artist, the certainty of seizing a likeness. The lineaments of his mind were delicate, and so harmoniously blended, as to present to the intellectual eye, an object on which it dwelt with serene and affectionate pleasure, conscious of excellence yet scarcely sensible in what it consisted.

The late Chief-Justice was descended of Irish parents, but was born in London, on the 1st March, 1769. At the age of twelve years he was removed from his widowed mother, and brought over to this country under the charge of his elder brother the late *James Taylor*, Esq. By the assistance of this kind relative, he obtained, though in an imperfect degree, the benefits of a classical education, at the College of William and Mary in Virginia. Compelled to leave College before his Academical career was completed, he came to North-Carolina, and after a short preparatory course of legal study, in which he had no preceptor nor guide, he was called to the bar at an unusually early age—before he had finished his twentieth year. The young tranger settled himself at Fayetteville, and there, without patronage or connections, soon gained the affections, and attracted the confidence of those around him. His gentle, unobtrusive manners, a singular felicity of expression, which always seized, and apparently without effort, the most appropriate word for the communication of a thought, a playful but ever benevolent wit, united with quick perception, great ingenuity in argument, and a most retentive recollection of whatever he had read, opened for him at once the career of eminence, in which he advanced without faltering His success excited no envy, for it was wholly unaccompanied by arrogance, and rendered but the more conspicuous the generosity of his temper, and the kindness of his heart. He was elected more than once to represent the town of Fayetteville in the General Assembly, and he actually occupied this station in the year 1796, immediately before his removal to Newbern. In 1798, he was appointed by the Legislature one of the Judges of the Superior Courts of Law and Equity, then the highest tribunals of justice in our State. In the year 1810, when the Legislature directed the Judges to appoint one of their own body to preside as Chief-Justice in the Supreme Court, he was unanimously selected for that high distinction ; and in 1818, when the Supreme Court was newly organized, he was elected by the General Assembly one of its Judges, and by his associates re-appointed the Chief-Justice.

How he discharged his duties during the twenty years he administered justice on the circuit, it is impossible that the bar or the community can have forgotten. He was pre-eminently a safe Judge. It was difficult to present a question for his determination, upon which his reading had not stored up, and his retentive memory did not present some analogous case, in which it had been settled by the sages of the law. And with him it was a religious principle to abide by the landmarks, "*stare decisis*." In his charges to Juries, he was full and perspicuous, and while he left unimpaired their dominion over the question of fact, he never shunned responsibility by evading a distinct expression of opinion on every point of law. His patience was exemplary, and his courtesy universal. Uniting in an extraordinary degree suavity of manners with firmness of purpose; a heart tremblingly alive to every impulse of humanity, with a deep seated and reverential love of justice—the best feelings with an enlightened judgment—he made the law amiable in the sight of the people, inspired affection and respect for its institutions, and gained for its sentences a prompt and cheerful obedience.

Of the mode in which he executed his functions as a Judge of the Supreme Court, the world can have few opportunities of judging, except from his reported Decisions; and to these we appeal, as furnishing no slight testimony of his merits. We presume not to set up ourselves as the most competent judges on such subjects; but we will not hesitate to express our belief, that while all may be read with profit and are entitled to respect, there are many—very many—which may be regarded as models of legal investigation and judicial eloquence. There is indeed a charm in all his compositions seldom to be found elsewhere, which has induced not a few to regret that the Chief-Justice had not devoted himself entirely to a literary life. He would probably have proved one of the most elegant writers of his day. He who could render legal truth attractive, could not fail to have recommended moral excellence in strains that would have found an echo in every heart.

Of the Chief-Justice, as a man, we are unwilling to trust ourselves to speak as we feel. We loved him too well and too long, to make the public the depository of our cherished affections. If there ever heaved a kinder heart in human bosom, it has not fallen to our lot to meet with it. If ever man was more faithful to friendship, more affectionate in his domestic relations, more free from guile, more disinterested, humane and charitable, we have not been so fortunate as to know him.—When we think of these excellencies—when we call to mind the instances in which we have seen them illustrated in practice, and felt their kindly influence—and when we look around into the wide world to search for those who may supply his place in our affections, the exclamation arises involuntarily:

> "Vale! Vale!
> "Heu quanto minus est, cum reliquis versari,
> "Quum tui meminisse!"

At a meeting of the Executive Council, held in Raleigh, on the 8th day of May last, JOHN D. TOOMER, Esq., was appointed a Judge of the Supreme Court *ad interim*, to supply the vacancy occasioned by the death of the late Chief-Justice, and took his seat the first day of this Term.

At a meeting of the Judges of the Supreme Court, held during this Term, LEONARD HENDERSON, Esq., was appoined Chief-Justice.

John Henderson and others
v.
Robert Wilson, Executor of William Henderson, } From Mecklenburg.

Where a testator directed his land to be sold, and the proceeds applied to a purpose which failed, *held*, there being no evidence of an intent to convert the land out and out into money, that a trust resulting to the heir at law, notwithstanding a residuary clause bequeathing "any other thing not mentioned in this my last will."

The Master to whom the accounts of the Defendant were referred by an order made in this cause at December Term last (*Ante* 276,) reported at this Term that the sum of 7,440 dollars had been raised by a sale of the land devised by the testator to be sold. But whether this sum passed under the residuary clause of *William Henderson's* will, or to his heirs at law, or to his next of kin, was submitted for the decision of the Court. The following is a copy of those parts of the will which are considered important :

"I *William Henderson* &c. being possessed of a considerable property both real and personal, and desirous of directing a disposal of the same after my death, do the 9th day of January, 1818, make and publish this my last will:

"That is to say, the tract of land that I now live on, lying on the Catawba River, containing three hundred acres, and also fisheries, it is my last will and pleasure, that my executors, hereafter to be named, do, within six months after my decease, cause the aforesaid tract of land to be publicly sold to the highest bidder, after giving three months public notice, terms of sale to be one-third yearly until the amount is paid, the purchaser to give good and sufficient security, with mortgage on the premises. And my will is, that the money arising from said sale shall be disposed of as follows, that is to say, the money arising from the sale of said land shall be laid out in purchasing shares in the State Bank of North Carolina, or in purchasing shares of the United States Bank, and the profits arising to go towards paying a minister of the Gospel, who shall preach at the Seceding Meeting House called Gilead, in said County being on the great road leading from Charlotte to Beattie's Ford, (the party called the Associate Seceding party.)

(Here follow several trifling legacies.)

"The rest of my negroes, viz.: *Betty*, *Jerry*, *Frank*, *Jim*, *Alek*, five in number, with all horses, cattle, hogs, sheep, farming utensils, household furniture, and any other thing not mentioned in this my last will, I direct my executors to sell at public sale, and the monies arising to be laid out in the manner following: first, all my just debts to be paid, and funeral expenses to be paid. I give and bequeath *Hugh Lucas* one dollar. Also give and bequeath to *John Henderson* one dollar (son of *William*.) I also give and bequeath to *William H. Lucas*, forty dollars. Then the remainder or balance to be divided equally among the following persons: I give and bequeath to my sister *Jane* and family, I give and bequeath to my brother *Archy's* son, *James Henderson*, I give and bequeath to my brother *James* and family, each one to share and share alike."

This question was argued at the last term by *Badger*, for the residuary legatees, and by *Devereux*, for the heirs and next of kin, who were the same persons.

The Court took time to advise, and this term their judgment was pronounced by

Hall, Judge.—The question to be decided is, who is entitled to the proceeds of the sale of the land devised to be sold by *John Henderson's* will, as the object for which the testator directed the sale, cannot be accomplished.

Cox, in a note to *Cruse* v. *Barley*, (3 *P. Wms.* 22.)—*Bridgman*, in his index. (*Devise* 3 *pl.* 151,) and *Thomas* (in a note to his edition of *Co. Litt.* 2 *vol. page* 702,) unite in saying, that when real estate is devised to be sold, it is important to consider, whether the testator meant to give the produce of such estate the quality of personalty to all intents, or only so far as respected the particular purposes of the will. For unless the testator has sufficiently declared his intention, not only that the reality should be converted into personalty, but further, that the produce of the real estate shall be taken as personalty, whether such purpose take effect or not, so much of the real estate or the produce thereof, as is not effectually disposed of by the will at the testator's death, whether from the silence or inefficacy of the will itself, or from subsequent lapse, will result to the heir. The rule as thus laid down, seems to be supported by the following authorities, which are referred to for that purpose: *Randal* v. *Bookey*, (2 *Vern.* 425)—*Stonehouse* v. *Evelyn*, (3 *P. Wms.* 253)—*Fletcher* v. *Ashburner*, (1 *Brown Ch.* 502)—*Robinson* v. *Taylor*, (2 *Do.* 589)—*Stansfield* v. *Habergham*, (10 *Ves.* 279)—*Williams* v. *Coade*, (10 *Ves.* 500)—*Gibbs* v. *Ougier*, (12 *Ves.* 415)—*Hooper* v. *Goodwin*, (18 *Ves.* 156)—*Chambers* v. *Brailsford*, (18 *Ves.* 368)—*Gibbs* v. *Rumsey*, (2 *Ves. & Bea.* 294)—*Chitty* v. *Parker*, (2 *Ves. Jr.* 271.)

It may therefore be taken for granted, that as the devise of the lands cannot take effect under the first clause in the will, the heirs at law are entitled to the proceeds of the sale of such lands, unless some other clause in the will gives it another direction. Viewing the question under the first clause of the will, it is the common case of a disposition by will of money to be raised from the sale of land; which money has been raised, but the devise cannot be carried into effect, and the money remains not further disposed of, and no doubt can exist that a trust results to the heir at law. It can make no difference that the land has been sold, and that *money*, the proceeds of the sale, is the subject of dispute. (*Hill* v. *Cock*, 1 *Ves. & Beam.* 174.) It is however contended, that the testator has made a disposition of it in other parts of the will, which it is next proper to examine.—The only part of the will which it can be supposed has that effect, is where he directs his five negroes, with all his horses, cattle, sheep, hogs, farming utensils, household furniture, and *any other thing not mentioned in this my last will*, to be sold at public sale, and the money arising therefrom to be applied to the payment of debts, funeral expenses, and after giving some legacies, he directs *the remainder or balance to be divided* as follows: "I give and bequeath to my sister *Jane* and family, I give and bequeath to my brother *Archy's* son, *James Henderson*, I give and bequeath to my brother *James* and family, each one to share and share alike."

From this disposition it does not appear, that the testator intended to give to the produce of the land the quality of personalty to all intents, or to convert it out and out, (for in that particular he is altogether silent,) but only intends to convert it, so far as was necessary to answer the express purpose, for which a sale was directed. I say on that subject he is silent; because it does not appear to me, that the land or money in dispute is included, or was intended to be included in the residuary clause in the will last mentioned. The words (as far as concerns this question) are, "*and any other thing not mentioned in this my lastwill.*" He had directed his negroes, horses, furniture, &c. to be sold, and used these words to embrace any other articles of a like kind, that he might have omitted to mention. The residuum thus created is a special residuum of the *personal estate.* Of course the land or money in dispute is not included, not having been converted out and out, and therefore results to the heirs at law, as personal estate similarly situated would result to the next of kin, (10 *Ves.* 500—15 *Ves.* 416.) If it has not been converted into personalty, it would not pass in a residuary clause, intended to include a residuum of personal estate. (11 *Ves.* 90, see also *Gibbs* v. *Rumsey*, 2 *Ves.* and *Bea*, 296—1 *Ves.* and *Bea.* 416.) And it seems to be the opinion of the Master of the Rolls in *Dawson* v. *Clark*, (15 *Ves.* 414,) that a lapsed devise would not go to a residuary devisee, although a lapsed legacy would go to a residuary legatee, nor would it without the aid of our acts of Assembly, be subjected to simple contract debts. (*Gibbs* v. *Ougier.*) In *Collins* v. *Wakeman*, (2 *Ves. Jr.* 683,) money raised from the sale of real estate was expressly declared to be personal property. Yet as it was eventually undisposed of, it was held to result to the heir at law. (*Hooper* v. *Goodwin.*) So in *Sheddon* v. *Goodrich*, (8 *Ves.* 481,) it was held that money raised from the sale of real estate, not converted out and out into personalty, will not pass by a codicil, not attested so as to pass real estate.

There are cases however where residuary legatees have prevailed against heirs at law, as in *Mallabar* v, *Mallabar*, (*Ca. Temp. Talbot* 79,) and *Durour* v. *Matteux*, (1 *Ves.* 320.) and in those cases the Court was of opinion that the real estate was converted into personalty for all the purposes of the will, so as to be included in the residuary clause. So in the case of *Kennell* v. *Abbot.* (4 *Ves.* 802,) part of the money arising from the sale of copyhold estate was disposed of in legacies, the residue was expressly given in a general residuary clause; it was held that a void legacy, to be paid out of the same fund, passed by the residuary clause, that it was turned into personalty, and converted out and out.

Also in *Brown* v. *Bigg*, (7 *Ves.* 280,) where money arising from the sale of lands was directed to be laid out on security, and in a residuary clause, the testator gave after the death of his wife, the whole of his personal estate of every kind, both on *public and private security*, not disposed of in legacies, it was held to pass under such residuary clause.

But *Bridgman* (*Devise Pl.* 151,) says that these cases do not decide the question which would have arisen, if there had been no residuary disposition, or if such residuary disposition had been confined to *what was personalty at the testator's death.* According to that distinction, I think the heirs at law entitled in this case, for the residuary bequest was certainly confined to what was personalty at the testator's death. The land was to be sold after giving three months notice, and the proceeds of the sale to be paid in three annual instalments. The other property, he directs to be sold at no particular time, or upon no particular credit, and it is the unappropriated part of the proceeds of that sale, which in this case constitutes the residuum. "The remainder or balance to be divided amongst the following persons;" the remainder or balance of what ? The personal property before directed to be sold. He certainly never contemplated selling the money arising from the sale of the land. That money constitutes no part of the residuum. That was made up of the negroes and other property directed to be sold.

The heirs at law are therefore entitled to the money for which the land was sold, as the appropriation made of it by the testator cannot take effect.

PER CURIAM.—Decree accordingly.

James G. Stanly
vs.
Lewis Stocks, Wright C. Stanly, and Samuel Street, } From Craven.

Where lands conveyed in mortgage were sold by the mortgagor in separate parcels, the first vendee has no equity to marshall the whole mortgage debt upon a second—the latter having no notice of the purchase of the first.

If the second vendee had notice of the purchase of the first, would that fact alter the rule. Qu?

But where the first vendee paid his purchase money in extinguishment of the mortgage, and the second did not, *held* upon an adjustment of the loss between them, that the payment of the first was to be estimated in his favor.

This was an appeal from a decree made by his honor Judge MARTIN, on the [illegible] Circuit of 1828.

The facts ascertained by his Honor, and set forth in the decree were, that the Defendant *Stocks* being indebted to the Plaintiff in the sum of 1,280 dollars, by deed dated the 6th of March, 1824, mortgaged to him a tract of land in Craven County—that the Defendant *Wright C. Stanly* on the 3d of May, 1824, purchased a part of the mortgaged premises from the Defendant *Stocks*, and on that day received a deed for it with covenants of seisin, warranty and quiet enjoyment, and paid the purchase money to the Plaintiff—that the Defendant *Street* on the 8th of December, 1824 purchased of the Defendant *Stocks*, the residue of the mortgaged premises, and on that day received a deed therefor, with covenants of seisin, warranty and quiet enjoyment, and paid the purchase money to the Defendant *Stocks*—that there was due upon the debt secured by the mortgage to the Plaintiff, the sum of $244 50 with interest. "It was therefore ordered, adjudged and decreed, that the Defendant *Street* within forty days pay to the Plaintiff the said sum of $244 50 with the interest thereon, and in default of such payment, that the Clerk and Master sell the lands mentioned in the answer of the Defendant *Street*, and apply the proceeds thereof to the payment of the said sum of $244 50, and in case the proceeds of the said sale should not amount to a sum sufficient to pay the said debt, then that the said Clerk and Master sell the lands mentioned in the answer of the Defendant *Wright C. Stanly*, and apply the proceeds thereof to the satisfaction of the said mortgage, after deducting therefrom the proceeds of the land mentioned in the answer of the Defendant *Street*."

From this decree, the Defendant *Street* appealed to this Court.

Gaston, for the Appellant, contended warmly that the Defendant *Stanly* had no right to an indemnity at the expense of *Street*—that there was no proof of notice to the latter of *Stanly's* right, and that the claim not being to a specific piece of property, but being merely personal on the defendant *Stocks*, the maxim *qui prior est tempore potior est jure*, did not apply. He denied that the case of *Gill* v. *Lyon*, and *Clowes* v. *Dickinson*, (1 *John. Chan. Rep.* 447, and 5 *Do.* 235) were applicable, and insisted that it was a case of contribution between the Defendants, and that both should discharge the incumbrance in proportion to the value of their respective purchases. He cited 5 *Viner ab.* 562—1 *Eq. ca. ab.* 113—*Bacon's Maxims*, 15—*Cary's Rep.* 3, *Do.* 159—*Fitz. N. B.* 235 *b*,—3 *Dyer* 316 *b* and 332 *a.*—*Herbert's case*, (3 *Rep.* 13 *a.*) and *Webber* v. *Smith*, (2 *Vernon* 103).

Devereux, for the Defendant *Stanly*, cited the cases of *Gill* v. *Lyon*, and *Clowes* v. *Dickinson*, and contended that they were exactly in point. That the equity existing in favor of the Defendant *Stanly* against the Defendant *Stocks* was specific, and bound the land—he denied the necessity of notice to *Street*, as he held only an equity, and cited to this point *Jones* v. *Zollicoffer*, (*N. C. Term Rep.* 225,) and insisted that the oldest equity was the best. He urged that *W. C. Stanly* could have marshalled the Plaintiff upon that part of the land purchased by *Street*, that it continued in the possession of *Stocks*, and that *Street* could have no better title than his assignor had.

Upon the authority of *Harris* v. *Ingledew*, (3 *P. W.* 98) and *Cheeseborough* v. *Millard*, (1 *John. Ch. Rep.* 409) he contended that the Defendant *Stanly* had an equity against *Street*, because the land purchased by the former had already paid a portion of the mortgage debt.

Henderson, Chief Justice.—It is neither alleged, admitted, nor proved, that when *Street* purchased from *Stocks*, he had notice of *Wright C. Stanly's* prior purchase from him. But it is insisted on behalf of *Stanly*, that notice is entirely unimportant; that it is so, only where one party has the legal, and the other the equitable interest. That the doctrine founded upon it have no application where both parties have an interest of the same kind, to wit: both legal or both equitable; in such cases priority of acquisition is the rule by which the respective rights of conflicting claimants is determined. For this is cited the case of *Jones* v. *Zollicoffer* so often in this Court. It is true, that where two persons claim the *same thing*, both under a legal, or both under an equitable title, the priority of acquisition alone is regarded, and notice is unimportant. Notice is only important where one claims the legal, and the other the equitable estate. In this case the parties do not claim the same thing; one claims one part of the land, and the other another part. The equity of *Wright C. Stanly* is, that *Stocks* should disencumber his lands from the mortgage, and that as between him and *Stocks*, the whole mortgage debts should be thrown on the residue of the mortgage lands retained by *Stocks*. This equity is I think personal to *Stocks*, and is not in the nature of a lien on the lands. To affect *Street* with it, he must when he purchased, have had notice of the obligation imposed on *Stocks*, for there was no such incumbrance on the land, as to affect it in the hands of a *bona fide* purchaser without notice. Had there been notice, I forbear to say what would have been its effects in this case.

But I think *Stanly* has another equity, which the case presents. It appears, that he paid the purchase money of that part of the mortgaged premises purchased by him, to the mortgagee. This was a payment by the land, and as in equity the land is the debtor, it discharged the lien *pro tanto* from that part which paid it, as to the holders of the other part; and gave the purchaser a right to call upon the mortgagee for all his facilities of enforcing payment out of the other lands, if he, the mortgagee, should levy the balance out of the land thus purchased. For between several purchasers of the mortgaged lands, each one has a right against the others, of compelling every part to bear its burden. *Wright C. Stanly's* purchase has already borne part of the burden. The Master will estimate what each part is to pay, according to these principles, taking as his guide the report made by the Master of Craven County, as to the amount due, value of each part of the mortgaged lands, and the sum paid by *Wright C. Stanly*.

PER CURIAM.—Decree accordingly.*

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* It is proper to say that the case in the Court below was decided upon an admission of notice to *Street*—the Reporter was Counsel in that Court, and in drafting the decree conceived, erroneously, that the fact was of no importance, and neglected to insert it.

James H. Smith, Administrator
v.
John Washington and David Thompson, } From Johnston.

A conveyance of a *chose in action* in trust to pay a debt, is within the act of 1820, (*Revisal Ch.* 1037,) and unless registered within six months of its date, is void against a subsequent *bona fide* assignee without notice.

The bill charged that the Plaintiff's intestate being surety for one *Robert H. Helme* to a large amount, and *Helme* being anxious to indemnify him, conveyed to the Plaintiff, in trust for the intestate, by deed dated November 17th, 1825, a decree for a sum of money which he, *Helme*, had obtained against the firm of *John Williams & Company*, of which he was a member. The deed was filed as an exhibit and appeared to have been proved on the 25th of August, 1826, and recorded the 2d of September following.

The Defendants claimed under an assignment of the same decree made by *Helme* to them, junior in point of date, but proved and recorded within six months of its execution, and denied notice of the prior assignment to the Plaintiff.

The only question discussed was, whether the conveyance of a *chose* in action, in trust to secure a debt, was a conveyance which the act of 1820 required to be proved and registered within six months after its execution.

Badger and *Devereux*, for the Plaintiff.

Seawell and *Gaston*, for the Defendant.

Hall, Judge.—The object in registering mortgages and deeds of trust is, to guard against fraud and deception, by giving notice of the real situation of the debtor to all who may be interested in knowing it. To that end the Legislature have declared, that no mortgage or deed in trust for any estate, whether *real or personal*, shall be good against creditors or purchasers, unless proved and registered within six months. (*Act of* 1820, *Revisal Ch.* 1037.)

The obvious intent of the act, so far as creditors and purchasers are concerned, is to give publicity to conveyances which transfer the title of property to others, when the debtor retains the possession of it, and uses it as his own. It is true, generally speaking, that there cannot be such a possession of *choses* in action, when separated from the right, as would be so likely to deceive third persons. But it is in suppression of the mischief, and in furtherance of the remedy, to require that mortgages and deeds of trusts of *choses* in action, should also be registered. *Choses* in action are rights which may give a credit to the person in whom they are vested, and a transfer of them *in secret*, contrary to the reputed right, might readily tend to fraud and deception. *Choses* in action, judgments, debts, &c., are certainly included in the term *personal estate*. And that they come within the mischief intended to be remedied, is proved by the present controversy. *Blackstone*, (*vol.* 2, 398,) divides personal property into that which is in possession, and that which is in action.

From the premises, I must conclude that the debt due from *John Williams & Co.* to *Helme*, evidenced, the bill states, by a decree, is personal estate, and that a conveyance of it in trust must be registered according to the act of Assembly, herein before recited.

Per Curiam.—Dismiss the bill with costs.

David J. White and Ann J. Colvin *v.* William H. Beattie, Ex'r. of Ann J. White,	From New Hanover.

Specific legacies do not abate upon a deficiency of assets, unless all the property of the testator be specifically bequeathed.

But where the testator does not give away the whole of his property specifically, and what is left, is afterwards consumed or destroyed by the testator or his executor, this circumstance will not make the specific legacies abate.

It seems that to determine whether a specific legacy shall abate or not evidence of the state of the assets *dehors* the will, may be received.

The case of *White* v. *Beattie*, (*ante* 87,) overruled upon a re-hearing, as to the abatement of the specific legacies.

This cause was heard again at the present term, upon the petition of the Defendant to set aside the interlocutory order, made at December Term, 1827, and reported ante page 87. It is proper to explain an apparent difference between the statement of that case, and the opinion of the Chief-Justice, in respect to the accounts of the Defendant. Estimating debts alone, the Defendant was in arrears—but adding to the amount of debts the expenses incurred by the Defendant in erecting a wall round the grave-yard, and placing a tombstone over the testatrix and her mother, he was in advance.

Badger argued for the Petitioner. No Counsel appeared for the Plaintiff.

Henderson, Chief-Justice.—The general rule is, that specific legacies do not abate, in favor of either general or pecuniary legacies. But as this maxim is founded on the presumed intent of the testator, that they should not abate, they are made to do so, when the testator directs that they shall. He is presumed to give that direction, or so to intend, when he gives away the whole of his estate in specific legacies, and then gives a pecuniary legacy. For how otherwise is the pecuniary legacy to be paid. But where the testator does not give away his whole personal estate in specific legacies, if what is left is afterwards lost, destroyed or used by the testator, or is wasted or consumed by the executor, in payment of debts or otherwise, such supervenient circumstances will not alter the construction of the will. For it is a question of intent at the time of making the will. We must collect the intent, so far as regards the present question, by applying the words of the will to the then existing circumstances, and it is not to be affected by the changes which time and chance may have produced. Otherwise the intent would be changeable and fluctuating, not fixed and uniform ; one intent to-day, another to-morrow.

This case does not render it necessary to discuss the question, whether it must be collected from the face of the will, that all the property is exhausted in specific legacies ; or whether the fact may be proved by evidence *dehors* the will. For it does not appear in this case, what was the state of the funds when the will was made. I presume, however, that it would impugn no rule of law or evidence, to prove the fact by extrinsic testimony. It appears that the testatrix had other property at her death, besides what she specifically bequeathed.

I cannot perceive on what grounds the decree heretofore made can be supported. The case of *Sayer* v. *Sayer* (*Prec. Chan.* 393,) on which it was professedly founded, does not support it. The truth is, that when the case was before us heretofore, the facts were strangely misconceived.

PER CURIAM.—Let the bill be dismissed with costs.

Thomas C. Dunn
v.
John Holloway, Robert Cannon et al. } From Montgomery.

Upon the construction given to the act of 1788, (*Rev. Ch.* 284) for avoiding securities given upon a gambling consideration, money lost and paid, cannot, at law, be recovered back.

Therefore equity will not interpose to restrain the collection of a judgment, obtained on a bond void under that statute, unless it was obtained by a fraudulent circumvention of the Defendant at law.

The bill charged that the Plaintiff being a young and inexperienced man, had been induced to play at cards with the Defendants, who, by means of a combination between themselves, had won a large sum from him—that nearly all of the winnings of the Defendants had, by an arrangement between themselves, been thrown into the hands of the Defendants *Holloway* and *Cannon*, to whom several bonds, executed by the Plaintiff for the money thus won, had been assigned—that suits had been instituted, and judgments rendered on these bonds. The prayer of the bill was for a discovery and an injunction.

The Defendants all denied any combination to win money of the Plaintiff—but admitted that the bonds mentioned in the bill, had been given to secure money won at play. The Defendants *Holloway* and *Cannon*, admitted that they had won very small sums of the Plaintiff, and that they had purchased bonds executed by the Plaintlff, which they knew were given for money won at play, and that these bonds in some instances, had been incorporated with others, and were the same upon which the judgments had been rendered.

Copies of the records in the actions at law, were filed as exhibits to the answers, from which it appeared that the only pleas entered were those of Payment and a Set off.

At the hearing, his Honor Judge Daniel perpetuated the njunction except as to one judgment which was founded on a note assigned to the Defendant *Holloway*, and which was purchased by him at the request of the Plaintiff. Upon this judgment, his Honor also perpetuated the injunction as to the discount made by *Holloway*.

From this decree the Defendants *Holloway* and *Cannon* appealed.

The case was fully argued by *Gaston* and *Ruffian*, for the Appellants, and by *Badger* for the Plaintiff. The Reporter regrets his inability to give an abstract of it, as during a considerable part of the trial he was unable to attend in Court.

Hall, Judge.—If such a construction had, or could have been given to the act of 1788, (*Rev. Ch.* 284) made for the suppression of gaming, that no title would have accrued to money or property won at any game, whether the same was delivered and paid or not, I think the ruinous effects of gaming would have been more radically prevented. If money won and paid could be recovered back, a successful gamester would hold it by too doubtful a tenure to risk as much to get possession of it, as he would, when he knows that possession makes it his own. Considerations of this sort, however, belong to the Legislature, because judicial decisions have given the act a different construction. The law may be taken as settled, that money won and paid, cannot be recovered back.

The case before the Court is not one in which a Court of Equity is called upon to cause bonds to be delivered up, which were given upon a gaming consideration, but to enjoin the Defendants from further proceedings upon judgments obtained at law, upon bonds admitted to have been thus given, when no resistance was made at law to prevent the judgments from being obtained.

If the judgments were paid off, it would be the common case of money paid on a gambling consideration, which could not either at law or in equity, be recovered back.

At law, the rights of the Defendants under the judgments are perfect. They can take out executions, and possess themselves of the money through the ministerial agency of the Sheriff. Possession of the money make them more secure in the enjoyment of it, but it gives them no better right to it than the judgments do; therefore, a Court of Equity will not sooner interfere, where judgment has been obtained upon a bond given upon a gaming consideration, where no attempt has been made to prevent it, than it will where money has been won and paid over.

There is much complaint of fraud and circumvention in the bill, and did it appear that the judgments were obtained through the instrumentality of these means, a ground might be furnished on which to support the injunction. But that does not appear to be the case. They were obtained *not* against Plaintiff's consent. His opposition has arisen since; but I think it cannot avail him, nor prevent a dismission of his bill.

Per Curiam.—Let the bill be dismissed.

———o———

Henry Cook
v. } From Wake.
Mildred Streator et al.

Where letters of administration upon the estate of a deceased debtor never have issued, and after more than seven years from the death of the intestate, assets come to his heirs—it was held, upon a bill filed by a creditor setting forth these facts, and praying to have his debt paid out of the assets lately come to the possession of the heirs, that the act of 1715, (*Rev. Ch.* 10) was a bar to the debt.

The Plaintiff in his bill, which was filed in September, 1826, alleged that *John Streator* was indebted to him, and on the 26th of April, 1806, executed a bond to secure the debt, payable on the 1st June thereafter—that soon after the execution of the bond, *Streator* died insolvent and intestate, that letters of administration upon the estate had never issued—but that at the time of his death, a suit in the Court of Equity was pending by which the said *Streator* sought to redeem a valuable tract of land which he claimed to have been really conveyed in mortgage, although the deed was absolute upon its face—that the Defendants were the heirs at law of *Streator*, and had carried on the suit upon his death, and within a few months past, had obtained a decree for redemption, and for the rents and profits, which amount to a large sum, (vide the case reported, 3 *Hawks* 433.) The prayer was, that the Plaintiff might have satisfaction of his debt from the fund thus recovered by the Defendants.

The Defendants in their answers, relied upon the act of 1715, (*Rev. Ch.* 10,) entitled " an act concerning proving wills and granting letters of administration, and to prevent frauds in the management of intestate estates."

The case was submitted by *Seawell* and *Badger* for the Plaintiff.

W. H. Haywood, for the Defendants, argued that if administration had been taken out by the Defendants the day before the bill was filed, and the Plaintiff then have sued at law, he would according to the clear construction of the statute, have been barred. For this was cited *Ridley* v. *Thorpe*, (2 *Hay.* 343,)—*Hollowell* v. *Pope*, (2 *Mur.* 108,)—*Hamilton* v. *Smith*, (3 *Do.* 115,)—*Bell* v. *Beeman*, *Do.* 273,)—*Jones* v. *Brodie*, (*Do.* 594,) and *McIntyre* v. *Carson*, (2 *Hawks* 544.)

Hall, Judge.—In this case the Defendants have pleaded the act of 1715, which declares, that creditors of any person deceased shall make their claim within seven years after the death of such debtor ; otherwise such creditor shall be forever barred. The Plaintiff charges that *John Streator* died insolvent, and that the letters of administration on his estate have never been granted to any person.

With respect to his insolvency, it appears that a suit was pending against *Jones* at his death, in which he had an interest. A recovery has been effected by his representatives since his death, so that it does not appear that he did die insolvent.

With respect to the other objection that no person administered upon his estate, it may be observed that no person has yet administered, and the Plaintiff had as much right to sue within seven years after his death, as he had when he brought this suit. He might have administered upon *Streator's* estate himself, and in that character might have filed a petition against the heirs at law under the act of 1789, (*Rev. Ch.* 311,) provided there was no personal estate. As there was no obstacle to bringing suit within seven years more than exists at this time, and no suit was brought before the present one, I think the act before recited is a bar to it.

PER CURIAM.—Let the bill be dismissed with costs.

———o———

John Barnes
v. } From Wayne.
Turner Dickinson,

Whether a bill to review a decree of the Court can be filed in a Court below. Qu?

A bill of review for newly discovered testimony cannot be sustained, if the discovery was made in time to have been brought forward in either a re-amended or supplemental bill.

It is an error to say that an injunction is of course waived by an amendment. But an injunction is never propped by an amendment.

This was a bill of review for matter of fact, filed in the Court below. The cause sought to be reviewed was decided in this Court, and is reported *ante* 273.

The bill charged, that since the trial at law, between the same parties. (Law Cases, 1 vol. 346,) the Plaintiff had discovered that the witness *Rebecca Hicks* had been bribed by the Defendant, and had on that trial been guilty of perjury. The Plaintiff then averred that he did not discover the fact above mentioned " until after the filing of the said original bill," and at the return Court of said bill, his Counsel moved to amend the same so as to charge the said newly discovered matter, when the Court decided that an amendment to said bill could not be granted, and the injunction retained. The prayer of the bill was, that the injunction might be continued, and for general relief.

On the last Circuit, his honor Judge Norwood, on the motion of the Defendant, dismissed the bill for want of jurisdiction, it being a bill to review a decree of the Supreme Court. From this decree the Plaintiff appealed.

The cause was submitted without argument, by *Gaston*, for the Plaintiff, and by *Badger* and *W. H. Haywood*, for the Defendant.

Henderson, Chief Justice. This is a bill of review for error in fact in a former decree, made in this Court. Waiving every other objection, I think that the bill cannot be sustained because it appears in the bill itself, that the error, or rather, the cause of complaint, was known to the Plaintiff, at the return term of the original bill, time enough for him to have availed himself of it in that suit. For if the bill did not embrace it, it might have been amended ; or if that could not have been done, it might have been brought before the Court by supplemental bill. The necessity, under which the Plaintiff says he was placed, of abandoning his injunction, if he amended his bill, (if in fact it did exist,) would have been obviated by a supplemental bill, leaving the injunction to be sustained, if it could by the original. I fear that the common idea, that an injunction is given up by an amendment, is carried too far ; it is going sufficiently far to say, that an injunction cannot be sustained or propped by an amendment.

Per Curiam.—Let the decree of the Court below be affirmed.

Mary J. Hester et al,
v.
James Hester and Samuel Young, Ex'rs. of John Hester.
} From Granville.

When no rule for the management of a trust estate is prescribed by the creator of it, the law enjoins good faith, by which is meant honesty and diligence carefully applied—and a departure from the rule prescribed by the creator, or a failure in good faith, is a breach of trust for which a trustee is liable.

Where a testator directed his debts to be collected, and a tract of land to be sold, and with the fund thus created, a residence for his family to be purchased—but the executors purchased to an amount exceeding the fund, and in the exercise of good faith, refused an advantageous offer for the land. It was held, that they had been guilty of a breach of trust only in exceeding the amount of the trust fund, and the purchase being devisible, they were decreed to hold the excess on their own account.

From the pleadings, proofs, and exhibits the case was, that *John Hester* died having made a will, and appointed the Defendants his executors, having devised all his property as follows, viz." I wish my tract of land in Granville sold, and out of the proceeds of the sale, together with the money due me, I wish my executors to purchase a piece of land somewhere most agreeable to my wife *Mary J. Hester*, for her and my children to live on, the balance of my property I lend to my wife during her natural life to raise and school my children on," after which in the event of his widow's marriage, he directed all his estate both real and personal, to be divided among his widow and children. At the death of the testator, his net personal estate, exclusive of his negroes, amounted to 1,484 dollars which together with the sum to be realized by a sale of the land, constituted the fund appropriated by the testator for the purchase of a tract of land, for the residence of his family. Before a sale of the Granville land had been effected, the Defendants influenced by the urgent requests of the widow, and against their own judgments, purchased a tract of land for which they gave 3,000 dollars, executing their own bonds to secure the excess of the purchase-money over the fund in their hands. After this they made what they thought an advantageous sale of the Granville tract for 1,000 dollars, but the widow of their testator being extremely dissatisfied with the price, they upon her remonstrances, vacated the bargain.

The Plaintiffs were the widow and children of the testator, all of whom were infants, the former having become dissatisfied with the purchase made by Defendants. The prayer of the bill was, that they might be compelled to take it upon their own account, and to purchase another tract more suitable to the wishes of the Plaintiff *Mary*, and that they might be charged with the $1,000, which they had refused for the land.

By an interlocutory order, the land devised by the testator had been sold, and produced the sum of $400.

The case was argued at June Term, 1827, by *Devereux*, for the Plaintiffs, and by *Badger* and *W. H. Haywood*, for the Defendant. At this term it was again argued by

Hillman, for the Plaintiffs.—As the proceeds of the sale of the tract of land directed to be sold, and the money due, constituted the only fund out of which they were authorised to purchase and pay for the land directed to be bought, it follows, of course, that they ought to have lost no time in making the sale, and ascertaining the nett amount of debts due, in order that they might know what amount they would be justified in contracting to give for the piece of land which they were directed to purchase. It appears, however, from the answer, that soon after the death of the testator, and before they had sold the tract of land which he owned, they contracted for the purchase of a tract of land for the sum of $3,000, which they were aware was an imprudent purchase, and exceeded in amount what they were authorized to give; but they allege as an excuse, that they made it at the earnest request of the widow. This excuse cannot avail the Defendants. The will directs that the widow should be consulted as to the place *where*, not as to the quantity of land, or the price to be given for the piece of land directed to be purchased. In this they were expressly limited to the fund before mentioned—and when it is recollected that she is but one of the parties interested, her consent will have but little weight. The infant devisees and the other complainants, who were not consulted, have certainly a right to a fair execution of the trusts of the will. The widow was intended by the testator to be a trustee of the land to be purchased, for the purpose of *raising* and *schooling the children.* Her interest was so blended with theirs, that it cannot be distinguished. She had no right to consent to anything that would lessen the fund, or impair her means of accomplishing the benevolent objects of the testator.

The answer admits, and the proofs abundantly show, that the Defendants were offered $1,000 for the tract of land directed to be sold. Here again the excuse for *not selling* is, that the widow objected to the price. The answer to this is, that the executors thought the price a fair one, and that the testator knowing her weakness and want of skill and judgment in these matters, thought proper to confide the management of his estate not to *his wife* but to *them.* It is conceived, however, that the motives of the executors have nothing to do with the case. The will directs *that that tract of land* be sold, and leaves *no discretion* in them. They were therefore bound to sell; and I take it to be well settled law, that if they have failed to do so, and any loss has been occasioned thereby, they are bound to make good the loss. *Caffrey* v. *Darby*, (6 *Vesey jr.* 488.)—*Ld. Montfort* v. *Ld. Cadogan*, (17 *Do.* 485. *S. C.* 2 *Merivale*, 2)—*Massey* v. *Banner*, (1 *Jac. and Walk.* 241.)—*Langston* v. *Olivant*, (*Coop.* 33.)—*Alye* v. *Feuilleteau*, (1 *Cox*, 24.)—*Holmes* v. *Dring*, (2 *Do.* 1.)—*Scurfield* v. *Hawes*, (3 *Bro. C. C.* 90.)—*Saddler* v. *Hobbs*, (2 *Do.* 114.)—*Adair* v. *Shaw*, (1 *Scho. and Lef.* 243.)

The Defendants contend, that they are entitled to be indemnified for their advances from the other property of their testator, but I suppose it cannot be necessary *in this Court* to cite authority to show, that where a power is given by a will, the exercise of which is expressly limited to a particular fund, the executors cannot exceed that fund, the more especially when all the other property is given away by the will, for another and a different object. To hold that they could, would be not to decree an execution of the trusts of the will, but to set aside the will, and to substitute another, utterly different from any views the testator ever entertained.

(The Court intimated that this proposition was too plain to admit of doubt.)

Henderson, Chief-Justice.—A *breach* of trust necessarily supposes, that there is a rule for the government of the trustee. The creator of the trust may prescribe what rules he pleases. In the absence of one prescribed by him, the law enjoins good faith, which includes not only what is commonly understood by honesty and integrity, but care, diligence, and attention; and in matters of judgment and discretion, that they should be carefully applied. To purchase more lands, than the funds appropriated for that purpose would pay for, was a clear departure from the rule, which the testator in this case had prescribed to the executors, the trustees. Good faith and purity of motive afford them, therefore, no protection from the consequences of that act. But in the sale of the Granville lands, the testator prescribed to them no rule. The exercise of their best judgment and discretion, with vigilance and attention in obtaining the best price they could get for the lands, is the rule which the law has enjoined, and without a departure from it, they have been guilty of no breach of trust. We cannot consider the omission to take the offer of $1.000 a departure from that rule; and more especially, as the sale met the decided disapprobation of the principal *cestui que trust*, and the only one who was of age, and in whom also the testator reposed confidence, in an important part of the execution of the trust, by directing her wishes to be consulted as to the locality of the lands to be purchased.—But even without such excuse, we cannot consider a mere error in judgment, in omitting to close with that which after circumstances showed to be an advantageous offer, and which at the time was matter of doubt, to be a breach of trust. If such was the rule, it would drive trustees into disadvantageous contracts, or rather, it would prevent all prudent and discreet men from assuming the character of trustees. In cases of this kind, where judgment and discretion are confided in, and no rule given, good faith, defined as it is above, should afford protection. In the present case the gradual declension of property in price, particularly lands, is matter of history unexampled in this, or perhaps any other country. The most prudent who wished to sell, have held on from day to day, from month to month, and even from year to year, in hopes of better times. But they have as yet hoped in vain. Many of the most prudent have been protracted, and have property now in market, which when it was first brought there, would have commanded double its present price. To visit upon these trustees, who have acted with good faith, the consequences arising from acts so common throughout the country, with prudent men managing their own concerns, would be applying to them rules which they never thought of subjecting themselves to, and which neither the testator nor the law imposed.

The Master will ascertain the amount of the funds set apart for the purchase of the lands, valuing the Granville lands at the price obtained for them—he will take with him the surveyor of the County of Granville, and five freeholders, and lay off, for the purposes of the trust, as much of the land purchased by the executors as the said sum will pay for, rating the whole land at $3,000, the sum which was given for it by the executors, having a due regard to the locality of the lands and the convenience both of the *cestui que trusts* and the executors.—He will also take an account of the rents and profits of the surplus land, whilst it was in the hands of the *cestui que trusts*, so far and so far only, as it benefitted them above what the fund would have purchased. I would also sequester to the use of Defendants, the interest of the widow, if I could do so without vitally interfering with that of the children; but I cannot see how that can be done. Each party to pay his own costs.

Per Curiam.—Let the decree be made accordingly.

Thomas J. Norfleet
v.
Goodwin Cotton and William Brittain, } From Bertie.

Where an Administrator and one of the sureties to the administration bonds, were next of kin to the intestate, and upon a suit on the bond by an administrator *de bonis non*, a stranger also a surety, was alone subjected; held that he had a right in equity, to retain the share of the principal to indemnify him in full, and that of his co-surety, to equalize the loss. And that having satisfied the judgment, he had in equity, a right to recover back the shares of his principal and co-surety.

The assignor of a term for years has, in equity, no lien upon the land for the money agreed to be paid, as the consideration of the assignment.

The case as it appeared upon the pleadings and the report of the Master, was that *Henry Johnston* died intestate, and that administration upon his estate was committed to one *Alexander S. Johnston*, who gave bond for the faithful discharge of his duty, with the Plaintiff and one *William W. Johnston*, as his sureties—that among other personal estate of the intestate, the Administrator sold two terms for years, amounting in all to the sum of $5.135 50—that the said terms were purchased by *William W. Johnston*, who was a brother of the intestate, and also of the Administrator *Alexander S. Johnston* and the co-surety of the Plaintiff, for the sum of 5,089 dollars—that the said *William W. Johnston* never paid for the said terms—but had sold a part of them to one *Joseph S. Pugh*, who had not paid the whole of the purchase-money—that *William W. Johnston* died having made a will, whereof he appointed the Defendant *Brittain* executor, who had never paid any part of the original purchase-money for the said terms, and still retained possession of a part of them—and never had received the balance due from *Joseph S. Pugh* on his purchase from *William W. Johnston*. *Alexander S. Johnston*, the Administrator of *Henry Johnston*, died intestate, and administration upon his estate had been committed to one *David Clarke.* That the Defendant *Cotton* had taken out letters of administration upon the goods of *Henry Johnston*, not administered by *Alexander S. Johnson*, and brought a suit on the administration bond executed by *Alexander S. Johnston* with the Plaintiff and *William W. Johnston* as sureties, and had assigned as a breach of that bond, that *Alexander S. Johnston* never had accounted with, or paid over to the next of kin of *Henry Johnston* any part of the beforementioned sum of $5,135 50, that judgment had been thereon obtained for the Plaintiff at law, for the sum of $5,571 25, that the issue fully administered had been found for *Clarke*, the administrator of *Alexander S. Johnston*, and for the Defendant *Brittain*, the executor of *William W. Johnston*, and that the Plaintiff had been compelled to discharge the whole of the said judgment, the estates of *Alexander S.* and *William W. Johnston* being insolvent. That *Henry Johnston* died without issue, leaving five brothers and sisters, among whom were *Alexander S.* and *William W. Johnston*, who were entitled to two-fifths of the recovery made by the Defendant *Cotton*—that the estate of *Henry Johnston* who was not at all indebted, and that the amount recovered by the Defendant *Cotton*, remained in his hands subject to distribution.

The Plaintiff sought 1st, to have the shares of *Alexander S.* and *William W. Johnston*, refunded to him for his indemnity, and 2nd, to subject the residue of the leasehold interest in the hands of the Defendant *Brittain*, and the debt due the latter by *Joseph S. Pugh*, for the purchase of part of it. to the satisfaction of the debt due the Defendant *Cotton*; to whose rights he claimed to be substituted.

The case was submitted wihout argument, by *Hogg*, for the Plaintiff, and by *Ruffin*, for the Defendants.

HENDERSON, Chief Justice, after stating the case as above set forth, proceeded, I think that the Plaintiffs equity to have an indemnity from two-fifths of the estate of *Henry Johnston,* now in the hands of the Defendant *Cotton,* to which *Alexander S.* and *William W. Johnston* are entitled, is quite obvious. The action brought on the administration bond was in reality, the suit of the next of kin of *Henry W. Johnston.* The Governor, in whose name it was brought, was a mere trustee for them, and the administrator *de bonis non,* their agent. *Alexander S. Johnston,* can have no claim to an indemnity for his own mismanagement, against his own surety for the faithful discharge of his duty, yet in reality, as regards his fifth, the action on the bond was of that character, and for that purpose. Nor has *William W. Johnston* a right to seek from his co-surety an indemnity further than for one-half of the burthen; and it will exhaust, as it appears, the whole of his one-fifth, to equalize the burthen of the co-surety. There can, therefore, be no pretence for sustaining the action, either for the benefit of the principal *Alexander S.* or the co-surety, *William W.* And if the action ought not to have been sustained, the circumstance of the money being paid, cannot alter the rights of the parties in this Court, where the equity set up afforded no protection at law. The administrator *de bonis non,* must pay to the Plaintiff the two-fifth parts of *Alexander* and *William.*

As to the claim set up to the leasehold estates, in the hands of the executor of *William Johnston,* and the money due from *Pugh,* for the purchase of a part of them from *William Johnston,* I can perceive no higher claims to them on the part of the Plaintiff, than those of any other creditor of *William Johnston.* The payment of the purchase money by the surety gives him no specific lien; and even had he lien of a vendor, that I believe has never been held to extend to chattel interests. As far as I can perceive at present, as to any thing except the two-fifth parts of *Henry Johnston's* estate, the Plaintiff must stand as a general creditor.

PER CURIAM.—Let the decree be entered accordingly.

Joseph J. Alston Ex'r. of Robert Hill, et al
v.
Peter Foster, Administrator of John Huckaby,
From Franklin.

Where slaves are given by will for life, with a remainder over, an assent of the executor to the legacy for life, is an assent to that in remainder.

Where an executor has assented to a specific legacy, and afterwards an execution issues against the goods of the testator, in his hands, a purchaser of that specific legacy, at a Sheriff's sale under that execution, acquires no title.

From the pleadings it appeared, that one *Benjamin Hill* died in the year 1790, having given to his wife *Mary Hill*, a life estate in sundry slaves, with a remainder to his children. That the executor of the husband assented to the legacy to the wife, and put the slaves into her possession, and soon afterwards she intermarried with the Defendant's intestate. Upon the death of the widow of the testator which happened in the year 1817, the Plaintiffs who are those in remainder, or their representative, by this bill sought a discovery of the names of the slaves and their issue, and a division of them.

The Defendant in his answer, made the discovery required, and submitted to a division except as to some of the slaves, the ancestor of whom he contended his intestate had purchased in the year 1792, after his marriage with the widow of *Benjamin Hill*, at Sheriff's sale, under an execution against the goods and chattels of *Benjamin Hill* in the hands of his executor. The Plaintiffs alleged that the Defendant's intestate had fraudulently procured this sale to be effected, and by his contrivances, had bought in those slaves at and under value. Testimony was taken to this point, but a statement of it is thought to be immaterial.

Badger, for the Plaintiff, contended, that the assent of the executor to the legacy of a particular estate to the wife enured, so as to vest the title in those in remainder, and cited *Bacon ab. Executors and Administrators, L.* 2, 3.

Seawell, for the Defendant, submitted the case without argument.

HENDERSON, Chief Justice.—It is unnecessary to examine into the fraud charged upon *Huckaby*, in affecting the Sheriff's sale, under which he claims a part of the property. For by it he certainly acquired no title, be it ever so fair, as the executor of *Hill* had, before the issuing of the execution under which sale was made, assented to the legacy to *Hill's* widow for life, whom *Huckaby* afterwards married. The Sheriff therefore was not authorized to sell, the negroes not being the estate of *Hill* in the hands of the Executor. The property therefore remains in the same situation as if there had been no sale. As it is not so very clear, that the sale was fraudulently procured by *Huackaby*, he must be allowed the purchase-money paid by him.

The Clerk and Master will take an account of the hire of the negroes, and the money paid by *Huckaby*.

PER CURIAM—Decree accordingly.

——o——

Jesse Ives and Martha his wife
v.
Seth Sumner Ex'r. of James Sumner, } From Perquimons.

The lapse of thirty years, is no bar to an account of an administration.—But where a legatee had given a bond to exonerate the executor from his office as if he had never qualified, this was held to be evidence of a settlement, and, unexplained, to be a bar to an account.

Qu? Is not such a bond a release.

In this case the bill was filed for an account of the estate of one *Granberry Sutton*, the father of the Plaintiff *Martha*.

It appeared from the pleadings, that *Granberry Sutton* died in the year 1794, having made a will, whereof he appointed the immediate testator of the Defendant, executor. That by his will, he left to his mother *Sarah Sutton*, an annuity of fifteen pounds for her life, and all the rest of his property to his daughter, then an infant of tender years. That before her arrival at full age, viz.: in the year 1805, she married one *John Sutton*—that he died after her arrival at full age, and that she continued a widow for two years, when she married the Plaintiff *Ives*, in 1812. That *James Sumner* died in the year 1823, having all his life lived in the immediate vicinity of both the husbands of the Plaintiff *Martha*—was a man of property, and abundantly able to pay all his debts—and that more than thirty years had elapsed from the death of *Granberry Sutton*, to the filing of this bill—during which time, no claim of the kind now asserted, had ever been urged by the Plaintiff *Martha*, or either of her husbands.

The Defendant in his answer, relied not only upon the lapse of time as a bar to an account, but set forth the following instrument which was proved to have been executed by the first husband of the Plaintiff *Martha*, and insisted that in law it was a release, and of course a bar to the right of the Plaintiffs to call for an account.

"Know, all men, that I, *John Sutton*, *George Sutton*, and *James Whedbee*, of &c., are held and firmly bound unto *James Sumner* of &c., in the just and full sum of ten thousand pounds, to be paid, &c., December 30, A. D. 1805."

The condition of the above obligation is such, that if the above bounden *John Sutton*, his heirs, &c., do well and truly pay unto *Sarah Sutton*, (the mother of the testator *Granberry Sutton*,) the just sum of fifteen pounds a year during her natural life, and do release, exonerate, and discharge in every way, manner and form, the said *James Sumner*, his heirs, executors, and administrators, from the executorship to the will of *Granberry Sutton*, deceased, in as full and ample a manner as if he had never qualified thereto, then this obligation to be void.

Kinney, for the Plaintiffs, contended, that the lapse of time formed no bar, as the trust was express; besides which, that it was explained by the infancy and coverture. To this point, he cited *Tate* v. *Greenlee*, (2 *Hawks* 486,) and *Falls* v. *Torrance*, (4 *Do.* 412.) He argued that the bond could not be construed to be a release, and if it was taken as a release, that the general words of it were to be restrained to the particular purpose for which it was given, viz. : to secure the annuity to the mother; for this he cited *Liverpool Water Works* v. *Atkinson*, (6 *East*. 507.)—*Governor* v. *Matlock*, *Banner* v. *McMurray*, (*Ante*, 1 *vol.* 214 & 218) —and *Knight* v. *Cole*, (*Shower's Rep.* 150.)

Gaston, for the Defendant, insisted that the bond amounted to a release—that this was proved by the amount of the condition, as well as by its terms, and the time that had elapsed since its execution. For this he cited *Cuyler* v. *Cuyler*, (2 *John. Rep.* 186.)—*Deux* v. *Jeffries*, (*Cro. Eliz.* 352,) *Smith* v. *Mapleback*, (1 *T. R.* 446,) 2 *Sand.* 48, *a.*

Upon the authority of *Petty* v. *Harman*, (*Ante* 191,) he argued, that the execution of the bond closed the trust between the parties, and from that period, the effect of time operated as a bar.

HALL, Judge.—It is admitted by both the Plaintiff and Defendant, that *James Sumner*, the executor, during his life, and at his death, which happened A. D. 1823, had an ample estate, and fully sufficient to pay any demand which Plaintiffs might have against him; that Plaintiff *Martha* was a *feme sole* and of full age, A. D. 1812; that this suit was not brought until the year 1825. After such a lapse of time, although it forms no bar to the suit, it may be apprehended that exact justice could not be done, if the parties were to go into a settlement of their accounts. This, however, must be done, if the bond introduced by the Defendant does not interpose a sufficient bar.

This bond was executed A. D. 1805, by *John Sutton*, the first husband of the Plaintiff *Martha*, about eight or nine years after the death of the testator. It is given in the sum of £10,000, conditioned on the part of *John Sutton*, "to release, exonerate, and discharge in every way, manner and form, *James Sumner*, his heirs, executors, and administrators from the executorship to the will of *Granberry Sutton* deceased, in as full and ample a manner as if he had never qualified thereto." It must be understood from this strong language, that a settlement had taken place between the parties, the bond must be taken as proof of it, in the absence of any explanatory evidence. It is true that the bond has also a condition, that *John Sutton* shall pay to *Sarah Sutton*, the mother of *Granberry*, the sum of £15 a year during her natural life. But this is a distinct stipulation from the preceding one, and a distinct breach might be assigned for the non-performance of either. It cannot by any fair construction of the bond be believed, that it was given to guard the executor *James* from the demand only of *Sarah Sutton*. It was also given to guard him from the demand of the obligor *John Sutton*, husband of the Plaintiff *Martha*.

Per Curiam.—Let the bill be dismissed with costs.

Lewis Ellis
v.
William Ellis, } From Edgecomb.

Where the Plaintiff seeks specific performance of an agreement for the sale of lands, and the Defendant denies the contract as alleged and relies upon the statute, (1819, *Ch.* 1016,) parol evidence cannot be received, even upon the ground of part performance, to shew the contract.

Whether if the contract so partly performed were admitted by the answer, the execution of it could be decreed since the statute. *Qu?*

This cause came a second time before the Court, upon the petition of the Defendant to re-hear the interlocutory decree made at June Term, 1828. The case as then reported is found in this volume, (*Ante* 180,) and it is only necessary to state further, that by the answer of the Defendant, the contract as alleged by the Plaintiff, was denied; but the Defendant admitted he had contracted to sell to the Plaintiff, and averred the terms of the contract to be, that the Plaintiff should give a note of *Stanton's* with good security for $700, his own notes for the residue, and a deed of trust upon the land to secure the payment of the purchase-money. Upon this contract, the answer averred that the Plaintiff was led into possession, and the Defendant submitted to perform the contract so stated by him, and pleaded the act of 1819, *Ch.* 1016, in bar of relief upon the contract alleged by the Plaintiff and denied by the answer.

Proofs had been taken before the hearing, and the contract resting entirely in parol, there was great diversity in the testimony of the different witnesses.

Upon the petition for re-hearing, the case was very elaborately discussed by *Gaston* and *Badger*, in support of the petition, and by *Hogg*, in support of the decree, but the Reporter is unable to present to the profession a full view of the argument, and is unwilling to attempt an abridgment.

Hall, Judge.—Whether, if the contract, as set forth by the Complainant, was admitted by the Defendant, and the Plaintiff had taken possession of the land in consequence thereof, such contract ought to be carried into effect since the passage of our statute of frauds, I give no opinion.

The Plaintiff in this case sets forth one contract which the Defendant denies, and sets forth another contract, widely different from it, both by parol—and it is a question, whether either of them was understandingly entered into by the parties. To go into testimony to ascertain whether any, and what contract the parties have entered into, would be laying aside the Act of Assembly altogether, and sapping its usefulness. Indeed, if the evidence preponderated in favor of the Plaintiff, as perhaps it does, the enquiry would be equally improper. I am therefore of opinion, that the decree should be reversed, so far as it ordered the execution of the contract, because I think the circumstance of the Plaintiff's taking possession of the land does not obviate the objection and impropriety of going into an inquiry, to ascertain what the contract really was.

PER CURIAM.—Let the decree complained of be reversed, and let an account be taken by the Clerk of the costs and damages sustained by the Plaintiff in consequence of the Defendant's suing him at law and turning him out of possession of the lands mentioned in the bill, and let the cause be retained for further directions upon the coming in of the report.

EQUITY CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
NORTH-CAROLINA,
DECEMBER TERM, 1829.

Ailsey Flintham, Thomas Ross, Catherine Kerr & Nancy Kerr, Petitioners,
v.
Thomas Holder, Adm'r. of James Flintham, and the Trustees of the University, Defendants, From Orange.

Where there are children of the same mother, some born in wedlock and some illegitimate—the former class may inherit from the latter, and the latter may inherit from each other; but the latter cannot inherit from the former, nor can the mother, in any case, inherit from the latter.

The petition stated that *James Flintham* died intestate, without leaving any widow, child or other issue surviving, and possessed of a considerable personal estate, which had come to the hands of the Defendant *Holder*, as his Administrator—that the intestate was the illegitimate child of the petitioner *Ailsey*, and that the petitioners *Thomas*, *Catherine*, and *Nancy*, were the brother and sisters of the intestate; and the petitioners prayed that the Defendant might account with them for the personal estate of his intestate.

The answer of *Holder* averred his readiness to settle with and pay to the parties really entitled, but alleged that he had been advised by Counsel, that the Trustees of the University and not the petitioners, were entitled, and prayed that the question of right might be contested between the claimants, and that he might pay under the direction of the Court.

Upon the coming in of *Holder's* answer, the Trustees were made Defendants, and insisted that they were entitled, averring that the intestate was a bastard, and therefore the petitioner *Ailsey* could not take, and denying any knowledge of the relationship to the intestate claimed by the other petitioners.

Upon the hearing before his Honor Judge Norwood, in the Court below, it appeared that the intestate was the illegitimate child of the petitioner *Ailsey*, that he died without wife or issue, and that the other petitioners were the children of the said *Ailsey*, and born in lawful wedlock, and thereupon his Honor declared, that the petitioner *Ailsey* was not entitled to any part of the intestate's estate, that the Trustees did not take the same, but that the brother and sisters of the intestate were entitled thereto, as next of kin and sole distributees, and decreed the same to be paid to them accordingly, from which decree the Trustees appealed.

The cause was argued here by *Gaston*, for the Appellants and *Nash*, who was to have argued in support of the decree, was stopped by the Court.

The act of 1799, *Ch.* 522, upon the construction of which the case turned, entitled " an act to make provision for natural born children," is in these words :—

" That where any woman shall die intestate, leaving children, commonly called illegitimate or natural, born out of wedlock, and no children born in lawful wedlock, all such estate whereof she shall die seised or possessed of, whether real or personal, shall descend to, and be equally divided among such illegitimate or natural born children, and their representatives, in the same manner as if they had been born in wedlock ; and if any such illegitimate or natural born child shall die intestate, without leaving any child or children, his or her estate, as well real as personal, shall descend to, and be equally divided among his or her brothers and sisters born of the body of the same mother, and their representatives, in the same manner, and under the same regulations and restrictions as if they had been born in lawful wedlock; any law, usage or custom to the contrary notwithstanding."

Ruffin, Judge.—This case depends upon the just construction of the act of 1799, (*Rev. Ch.* 522.) It is contended, for the Appellants, that the decree is erroneous, because the words of the act confine its operation to the single case, where there are bastard children of a mother, leaving no children born in lawful wedlock; or at any rate, that no construction can carry it further, than to let in bastards alone to descents from bastards. Certainly the claim of the University must prevail, unless intercepted by a fair construction from the statute—since at common law, there is no collateral descent to or from a bastard. It is to be premised however, that even a refinement would be allowable, that led to an heir, and prevented property from being derelict. Our law leans against escheats. Half-blood has been admitted, although there be not a drop of the first purchaser's mingled with it. Parents inherit from children; widows from husbands; bastards from mothers, and from each other.

Two cases are expressly embraced in the act; the one descents from the mother, the other descents from the bastard themselves. As to the former, there can be no doubt, that the bastard cannot inherit, if the mother leave a legitimate child. The words are, where the mother "leaving no children born in lawful wedlock," her estate shall descend to her illegitimate children. The capacity of the bastard to inherit *from his mother* is, therefore, expressly limited to the single case of the mother's leaving no issue but bastards. We can be at no loss for the reason of this provision. The restriction grew out of the same policy, which at common law excluded bastards altogether, namely, an earnest and anxious desire to uphold and encourage the great social compact, marriage. To enforce that policy, our ancestors imposed the rigorous penalty of an escheat, rather than admit a bastard to the succession. Our legislature has yielded something to natural affection, but not so much as to impair the value to the parties, or the public, of that important relation.—Bastards are admitted, when there is no legitimate child, because it is of common interest, that all children should have a competent maintenance of parental provision; and because there seems a natural right in the child to the fruits of the parents labors, unless for better ends they can be bestowed on others, deemed more worthy It is still an object, not altogether unattainable, to reform the mother, and fit her for the duties of a mother and guardian of her unhappy and degraded offspring. If any thing has that tendency, it is marriage. The more prudent, the greater will be the probability of those happy results. To encourage the marriage, and prudent marriage of the mother, and thereby promote the real good of the illegitimate issue themselves, the statute holds out this inducement to a husband, that *his* children shall succeed to the *whole* of their mother's estate, in exclusion of others. This part of the act does not directly affect the present question; but it has a material bearing upon it, since it exhibits a decided preference, founded on the clearest and soundest reasons, which have a strong application to the other parts of the act, and enable us the better to discover its spirit. The words ought to be very positive, which should exclude the legitimate altogether from succeeding to bastard children, when we find the same act admitting them alone, in exclusion of the bastards, to inherit from the mother.

We come now however to consider the act itself, in reference to a descent from a bastard. The provision is, "if any such illegitimate child shall die intestate, without leaving a child, his estate shall descend to, and be equally divided among his brethren and sisters, born of the body of the same mother and their representatives, in the same manner as if they had been born in lawful wedlock." If there be none but bastards, unquestionably they succeed to each other. But if the intestate have two sets of brethren, one legitimate and the other illegitimate, then it is contended, neither succeeds, or the bastard only; and if he leave legitimate brethren only, that they are excluded.

The point is not entirely new. It was decided in a case where there were two lines, by the late Supreme Court.—(*Arrington* v. *Alston*, *N. C. Term Rep.* 310.) The descent was held to be both equally. But as the question was not much debated there the Court is willing to reconsider it.

The general scope of the act is, to prevent an escheat in a case where it existed before, namely upon the death of a bastard intestate, and without lineal heirs; and to provide for bastard brethren. But it is argued, that the descent between illegitimate brothers and sisters themselves is tied up to the case, where there are none but illegitimates. This is founded upon the words "any such," as referring to the illegitimate children spoken of in the previous sentence, that is to say, bastards of a mother, leaving no legitimate child. It must be admitted, that the clause is badly penned. But it may be construed without giving the restrictive and particular meaning to those words or relatives, which shall confine them to the happening of the whole case, provided for in the previous clause. "Such" need not be referred at all *to the mother.* The act does not mean, the bastard children of "*such*" *mother*, that is, one leaving illegitimate and no legitimate children—but only "such" or "any" illegitimate person.

It is the same as if the sentence had been written, "if *any* illegitimate child shall die," &c. It is but common respect to the Legislature to put such a construction upon the act.—Upon what conceivable reason, shall the existence of a brother born in wedlock defeat the descent from a bastard to another bastard brother. A motive of policy might, indeed, have induced the Legislature to make the legitimate sole heir to the intestate bastard. But they have not thought proper so to order, and it is to be remembered, that this objection cuts off both the lines, upon the ground that the existence of two lines is a *casus omissus* in the act, and remains as at common law ? I cannot think so, if there be none but bastards, the act expressly makes them inherit to each other. Shall that succession be defeated by any other means than a preferable heir. Why should it ? Good sense says, that the right of a bastard to inherit from a bastard brother shall not be destroyed by the existence of a legitimate brother, *unless the latter can himself inherit.* If the latter cannot inherit, it is the same as if he were not in being. This was the ground taken by the Court, in construing the sixth canon of descents in *Bell* v. *Dozier*, (*Ante*, 1 *vol.* 333.) In that case it was held, that the mother had an estate for life in land, derived by her son by descent from his father, though the son left a brother, who being of the maternal half blood, could not inherit, because there were also paternal uncles and aunts. The mother inherits against the words of the canon, because the intention was to postpone her, *only in favor* of brothers and sisters ; and if they cannot take, she shall.

If then bastard brothers may inherit to each other, notwithstanding the existence of legitimate brothers, may not the legitimate brothers in such case succeed as co-heirs ? The opinion of the Court is, that they do. It seems to follow necessarily from the act, if the positions already taken be true. For if the act in its true meaning is not confined to the case where there are none but bastards, and illegitimates may be heirs to each other, though there be legitimates, the latter must be also heirs. Wherever one can inherit, the other must. The words are, "be divided among his brothers and sisters *born of the body of the same mother.*" It is true, the object of the Legislature is disclosed in the title to be, to provide for bastard children. But that will not restrain the enacting words. They are broad enough to cover all the brethren of both kinds; and there is nothing in the context or reason to limit their sense. It is manifest, that the moral and political considerations which exclude bastards from the succession to the mother, when there is legitimate issue, have no force to exclude the legitimate from the succession to a bastard brother. They powerfully apply indeed, when a bastard shall claim to succeed to a legitimate brother. Accordingly, we find nothing of that sort in the act. There is no provision for a descent from a legitimate to a bastard. The descent from bastards alone is within the purview. Hence bastards can never inherit but from the mother and from each other. But the reasons, on which the legitimates are constituted sole heirs of the mother, alike require, that they should be co-heirs of the bastards If the Legislature had not thought so, but had intended to confine the descent from bastards to bastards alone, how easy would it have been to say, the estate descend "to all his *illegitimate* brothers and sisters, born of the body of the same mother." Instead of that, they say it shall descend to all his maternal brothers and sisters.

It follows, that the brethren born in wedlock succeed to a bastard brother in like manner, when that line exists by itself, and there is no surviving bastard brother or sister.

The act is limited to descents between the brethren. It does not let the parents in at all. The decree was consequently right in excluding the mother.

The decree is therefore affirmed, with costs in this Court to be paid by the Appellants. And as the whole case is not here, because the University alone appeared, this decree must be certified to the Superior Court of Orange, with instructions to proceed in the execution of the decree of that Court, as between the other parties.

PER CURIAM.—Let the decree be affirmed.

Frederick H. Collier }
v. } From Orange.
Lucretia W. Collier, }

For adultery, the Court *may* divorce *a vinculo matrimonii*, but is not bound to do so. It will in its discretion, either dissolve the marriage or decree a separation of the parties.

Where a husband admits his wife to conjugal embraces with knowledge that she hath committed adultery, he may notwithstanding seek a divorce for her subsequent misconduct.

Petition for Divorce. The Petitioner stated that he intermarried with the Defendant in the year 1824, and that about a year afterwards, she yielded to illicit solicitations, and had adulterous intercourse with several persons—that the Petitioner unwilling to abandon his wife, had removed from the village in which they first resided into the country, and had used every affectionate method to reclaim her, but the petition charged that she continued her former habits, and was then living in adultery.

The cause was heard below at September Term, 1829, before his honor Judge NORWOOD, when the jury found that the Defendant had committed adultery since her intermarriage with the Petitioner, had borne a child the fruit of her crime, and was still living in adultery.

Upon this finding, the Petitioner's Counsel moved for a divorce from the bonds of matrimony, which the Judge refused, and pronounced a decree of separation from bed and board, upon which the Petitioner appealed.

In this Court, *Winston* for the Petitioner, strongly insisted, that upon the facts found by the Jury, the kind of divorce was not a matter of discretion with the Judge, but he was bound to dissolve the marriage. Of the argument no note is in the Reporter's possession.

HALL, Judge.—Before the act of 1814, (*Rev. Ch.* 869) applications for divorce could only be made to the Legislature; and it was competent for them to divorce either from bed and board, or from the bonds of matrimony, at their discretion, without regard to the law as it then stood. But if jurisdiction had been transferred to the Courts on subjects of divorce, they must have decided according to the existing law.

But the Legislature transferred full jurisdiction to the Courts in that year, in each case of impotency, or living in adultery, to divorce either from bed and board, or from the bonds of matrimony, *at their discretion.* As the law stood, all cases of living in adultery were treated in the same way, but no doubt the Legislature considered that extraordinary cases of this kind might occur, attended with such circumstances, that sentence of separation from the bonds of matrimony would be both just and proper. The present case seems not to be one of that description, particularly when the circumstance is adverted to, that the petitioner took the Defendant back again after her first transgression. Indeed, this circumstance has been the ground of some doubt, whether the prayer of the petition ought to be granted, but it has been overcome by considering that the third section of the act, which declares that "in case the husband has admitted the wife into conjugal society, &c., after he knew of the criminal fact, it shall be a perpetual bar," to mean that it shall be a bar to a divorce for that criminal fact, but not to one of a similar kind of which she may afterwards be guilty.

From the facts set forth in the record sent here, I see no reason why the judgment given in the Superior Court should be disturbed.

Per Curiam.—Let the decree be affirmed.

James N. Smith
v. From Jones.
David Dudley,

Upon the opening of this cause, it appeared by a copy of the order of the Court of Pleas and Quarter Sessions for the County of Jones that pending this suit, the Plaintiff has been appointed the guardian of the Defendant.

Per Curiam.—Much danger may arise from allowing such a practice. It is therefore ordered, that unless the Plaintiff shall, at or before the calling of the cause at the next term, show that he has resigned the said office, the bill shall be dismissed with costs.

Richard Arendell, et al.
v. From Rutherford.
Daniel Blackwell, et al.

Upon the opening of this cause it appeared to the Court, that all the residuary legatees are not parties to the suit.

Per Curiam.—If the Plaintiff pressed the cause for a final hearing, the bill would necessarily be dismissed for want of proper parties. But it is the settled course of Equity practice, not to dismiss in the first instance for that cause, but to allow an amendment for the purpose of making proper parties; and as the Plaintiff elects that mode, such amendment may now be made. It cannot however be done in this Court. The cause must therefore be remanded, with permission to make parties. The Plaintiff to pay the costs of this Court.

MEMORANDA.

At the last Session of the General Assembly, THOMAS RUFFIN, Esq. of Raleigh, was elected a Judge of this Court to supply the vacancy occasioned by the death of JOHN LOUIS TAYLOR, Esq., late Chief-Justice.

At the same Session WILLIAM J. ALEXANDER, Esq. of Charlotte, was elected Solicitor of the Sixth Circuit, vice JOSEPH WILSON, Esq., who died during the recess.

EQUITY CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
NORTH-CAROLINA,
JUNE TERM, 1830.

Henry N. Jasper, Adm'r. of Sarah M. Jasper *v.* James Maxwell, Ex'r. of Stephen Outerbridge,	From Franklin.

Equity always compels the trustee to surrender the legal estate to the *cestui que trust*, unless the receipt of the profits by the trustee is necessary to effectuate the intention of the creator of the trust.

Where a testator bequeathed bank stock to his executrix, in trust, to pay the dividends to his daughter for life, and upon the expiration of the charter of the bank, gave the same shares absolutely to his daughter without any limitation over—*held*, that the daughter took the stock absolutely, and that her Administrator had a right to call for a transfer of it.

Where a husband received with his wife a large personal estate in possession during the coverture, and induced her to join him in a conveyance of her land to a third person, who re-conveyed it to the husband, and the conveyance and re-conveyance were only designed to vest the fee in the husband—*held*, upon a bill filed by the husband as Administrator of his wife, to recover chattels of which she was the *cestui que trust*, that the children of the wife by a former marriage had no equity to prevent his obtaining the legal title to those chattels.

The Plaintiff alleged, that the Defendant's testator had in his will bequeathed as follows:

"Whereas I have fifty shares in the State Bank of North Carolina, "&c. (setting forth shares in other banks, amounting in all to seventy-"six) it is my will, that my daughter *Sarah M. Fenner* shall have the "profits arising therefrom during her natural life, or until the charters "of said banks may expire. I do, therefore, by these presents, leave the "said seventy-six shares, in trust, with my executors, and I do hereby "authorise them to take charge of the said bank stock, and draw the "dividends as they shall become due and payable; and the said dividends, "when drawn by my executors, shall be paid over to my daughter, the "said S. M. F. for her use and comfort. Whenever the charters of the "said banks shall expire (if they shall not again be renewed) I do then "give and bequeath the said seventy-six shares to my said daughter S. "M. F., to her and her heirs forever."

The Plaintiff then averred, that the Defendant proved the will—that he, the Plaintiff, and the said S. M. F. had intermarried; that the Defendant, before the marriage, had regularly paid the dividends upon the stock to S. M. F., and since that event to himself—that S. M. F. was dead, and that letters of administration upon her estate had issued to him. The prayer of the bill was, that the stock might be transferred to the Plaintiff.

The Defendant, in his answer, admitted every fact charged in the bill; but, as matter of defence, stated, that S. M. F. was a widow at the death of his testator, and had children who were infants—that under the will of her father, she had received, in addition to the stock above mentioned, a very large personal estate, all of which the Plaintiff had received—that her father had also devised to her in fee-simple a valuable real estate—that there was no issue of the marriage between her and the Plaintiff, and that soon after the marriage, the Plaintiff had prevailed upon her to join him in a conveyance of her land to a third person, who according to a previous concert, had re-conveyed it in fee-simple to the Plaintiff—that the conveyance of the Plaintiff and his wife, and the re-conveyance to the Plaintiff, were without consideration, the only object being to assure the land to the Plaintiff in fee-simple absolute, to the injury of the children of his wife by her first marriage, to whom the Defendant insisted, that in equity and justice, they ought to descend.

The cause was heard upon bill and answer.

Badger, for the Plaintiff.

Seawell, for the Defendant.

RUFFIN, Judge.—The question made upon the will has no difficulty. The bank stock is bequeathed to the executors, in trust to receive the dividends as declared, and pay them over to the testator's daughter during her life, or until the charters expire, and upon that event, unless the charters be renewed, the stock itself is given to the daughter. In her then are united the present right to the whole profits, and the absolute ultimate dominion—which gives as perfect a property as is known to the law. The *cestui que trust* can call for the legal estate at her will. It is not like the case of a bequest in trust for the *maintenance* of another. There the trustee must retain the property, in order to provide out of the profits for the support of the object of the testator's bounty. He must keep the fund in his own hands, lest it be wasted. But here the fund is to go (eventually) directly to the daughter, and in the mean while, the whole profits, not *as* a maintenance to be provided by the executor, but as a general pecuniary legacy. The only purpose of the testator seems to have been, to save his daughter the trouble of receiving the dividends personally at the bank, and to give his advice to her to keep that fund in stock, as long as she could, in preference to vesting it otherwise. But whether that was his intention or not, such is necessarily the construction; for the law will not permit a testator to pass the absolute property, and then fetter it, without a limitation over, with restrictions inconsistent with the general ownership created by him. It is one of the first rules of a trust, that the *cestui que trust* can call on the trustee in this Court for the legal estate.

It would give the Court much satisfaction, if an equity could be raised on the other point made in the answer; and it is well worthy the consideration of the Legislature. The truth is, that by an undue influence, which every husband, either by blandishment or harshness, can exercise over a wife, she may be induced, and most of them are induced, indirectly, to convey their estates to their husbands, in the method practised here. But what can the Court do? It is a legal conveyance of a legal estate, supported by the statute. If not, let it be contested at law, and each party there make the most of his case. But if it be, where is the equity we can go on here? Both the husband and the children are volunteers; and the first in time is best off. Certainly if the deed were defective, Equity would not raise a finger to help it. But if it be valid in law, we are kept equally still; for there is no consideration to set us in motion. If the estate were a mere equity, we would gladly interpose; for our power would be exercised in the protection, and not in the restriction of the wife.

Per Curiam.—Let a decree be entered according to the prayer of the bill.

John Mardre et al.
v.
Richard Leigh et al. } From Perquimons.

Where the Plaintiff charged that the Defendant held slaves as his trustee, and prayed an account of the profits, and that the possession might be surrendered to him, and the Defendant denied the trust, and insisted that he had held possession twenty-six years adversely to the right of the Plaintiff, and there was no proof of the trust—*held*, even if the Court had jurisdiction for a discovery or an account, that as the possession of the Defendant was a bar to an action at law—by analogy, it was a bar to the relief.

This was an appeal from a decree dismissing the bill, pronounced in the Court below, by his Honor Judge Mangum. The bill charged that the Defendant *Leigh* intermarried with *Charlotte Spruill*, in 1794, and that in 1795, her father *Hezekiah Spruill* placed in *Leigh's* possession a female slave, named *Esther*, in trust, for such of *Leigh's* children, as *Spruill* should afterwards nominate as donees by his will—that *Mrs. Leigh* died before her father, who made his will in 1802, and died; and that by the will, the negro and her increase were bequeathed to *Leigh's* four daughters, *Elizabeth*, *Charlotte*, *Sarah* and *Louisa*, with cross remainders between them, upon the death of either under age and without leaving issue; that the defendant and his children resided together, and that he kept the negroes for their use, until the marriage of the daughters *Sarah* and *Louisa*, in 1825, when he refused to deliver them over: that *Elizabeth* died in 1805, at ten years of age: that *Louisa* and *Sarah* died covert in 1827, and that the plaintiffs, their surviving husbands, had obtained administration of their estates: that the other daughter, *Charlotte*, intermarried with *Ephraim Mann*, in 1826. The bill was filed in 1828, against *Leigh* and *Mann* and his wife, for *Esther* and her increase. The Defendant, in his answer, admitted his marriage in December, 1794, and that *Esther* was put into his possession by his father-in-law in February, 1795, when the negro was sent home with his wife. He denies positively, that it was upon any trust or express loan; and says, nothing was said of the terms, from which he concluded, that it was an advancement to his wife. He averred, that nothing to the contrary was said during *Spruill's* life; and that the first intimation he had, that the gift to him was not considered by his father-in-law as absolute, was in the will: that nevertheless he, the Defendant, claimed the property absolutely, and made that claim known to his daughters, and to *Spruill's* executor, and in the neighborhood generally: that the executor never made any demand, nor did his daughters, though each of them was more than twenty-four years old at her marriage; and he relied upon his adverse possession, and the statute of limitations, as against the executors and his daughters.

The proof fully sustained the Defendant as to the period of his acquiring the possession, and its nature. Many witnesses proved clearly, that he asserted in his family and the neighborhood, for more than thirty years, his ownership; and that his daughters were all of the ages stated in the answer, at the time of their marriage. A single witness deposed, that the negro was originally lent. She was a daughter of the testator *Spruill*. She did not say, that she heard any thing pass between her father and the Defendant, on the *subject* of this negro. But she often heard her father say, that he never would give his children any property during his own life; and that she had heard *Leigh* say, shortly after his wife died, that the negro was lent to him. There was no testimony to the particular trust alleged in the bill, viz. that the Defendant had kept the negroes for his daughters.

The case was argued by *Kinney* for the Plaintiffs, and by *Hogg* for the Defendants.

Ruffin, Judge.—I need not refer to the cases which establish the principle, that when a father before 1806, put into the possession of his child upon marriage, a slave, it was a gift, unless the contrary expressly appear. They are numerous and familiar. Upon the face of this case therefore, there was a gift. It is insisted, however, that the contrary is expressly proved here. That proof is by no means satisfactory. It does not go to any specific terms, upon which the possession was gained, as coming directly within the knowledge of the witness at the time. It is only by inference form the general declarations of the father, and from those of *Leigh*, made shortly after his wife died. The former are not competent to determine the character of the transaction. The latter might be easily misunderstood. It is extremely probable, that the Defendant might have said, that he considered the negroes his childrens'. As they came by their mother, he might, in conscience, have felt bound to bestow them upon her issue, in preference to any others he might have by a subsequent marriage. In that sense, he might have made the declaration proved. His answer cannot, therefore, be overruled by a single witness, whose testimony is of so uncertain a character. But it is insisted, that she is supported by the answer; because *Leigh* does not swear to an express gift. My inference is directly the contrary. The answer states what is in law a gift; and denies an express loan. This is much stronger with me, than if the Defendant had stated an express gift. It argues, that he has told the exact truth. If he had not, he would, at once, have come out with such a gift. The material part is the denial of the loan, which is positive. Upon the proofs therefore, there was a gift to the Defendant.

But if this were not so, and the negro was loaned, and not given, yet the Plaintiff could not get a decree. The particular trust alleged wholly fails, upon the evidence. We hear nothing of it, but in the bill. Taking it to be a loan by *Spruill* indefinitely, there is relief at law, by an action of *detinue* by the executor; or if he assented to the legacy, by the daughters. But if this Court could take jurisdiction, upon any principle of discovery or profits, the character of the Defendant's possession, being expressly adverse to the executors and legatees of *Spruill* for twenty-six years, would bar the action at law, and so, by analogy, bars relief in this Court.

PER CURIAM.—Let the decree below be affirmed.

William Johnson & Martha his wife,
vs.
William Person, Adm'r. of Thomas Person, the elder, and Thomas Person, the younger.
From Franklin.

Where a replication is taken to an answer, the answer is not evidence unless responsive to the bill—therefore, where the Plaintiff charged one assignment, and the Defendant denied that, and set up another, and no proofs were taken—*held*, that the case was to be considered without reference to either.

An administrator Defendant who denies the right of the Plantiff, and neither renders an account, nor pays money into court, is chargeable with interest from the time the Plaintiff's right accrued.

Where an estate is charged with the education of children, and a near relative takes that charge upon himself, upon an account between the children, he is to be taken as having intended a benefit to the estate, and not a personal bounty to the children.

A reference to the Master to take an account need not be renewed at every term between the order and the report.

If a party to a bill for an account resides out of the State, and has no known agent to attend to the suit, it is proper to serve notice of taking the account upon his Counsel in this Court.

The Plaintiffs alleged, that *William Person*, the elder, died in the year 1778, leaving a widow and five children, of whom the Plaintiff *Martha* was the eldest: that by his will, he gave the residue of his estate, after the payment of his debts, to his widow for life, but charged it with the maintenance and education of his four younger children, viz. the Defendants and two others, *Mary* and *Benjamin*, who were dead without issue—that the widow of *William*, the elder, proved his will, and died in 1818, and that *Samuel Johnson*, who was made a Defendant, had taken out letters of administration, *cum testamento annexo* of the testator. That *Thomas Person*, the elder, the brother of *William*, the elder, owed the latter a large debt, which never was settled until the death of *Thomas*: that upon his death, the Defendant *William*, the younger had taken out letters of administration upon his estate; that in the year 1804, the Defendant *William* the elder, by arbitration, settled with his mother, the executrix of his father, and there was found to be due the latter, from *Thomas Person,* the elder, the sum of £859; that the mother consenting that this sum should be paid to her children then living, the award was made to them, viz.: to all but *Mary*, who had died some time before; that the Defendant *William*, as the administrator of *Thomas Person*, the elder, had never paid the amount due upon the award, but had used the money thus due, and had possession of the award, or that it was lost—so that the Plaintiffs could not recover at law. The prayer was, that one-fourth of the award, with interest, might be made to the Plaintiffs.

The Defendant *William*, in his answer, admitted the debt, the arbitration and the award; but he insisted, that his mother was liable for the expense of educating the four youngest children, which she had never defrayed, it having been borne by his intestate *Thomas*, the elder. That, in consideration of this liability to the four younger children, the mother had relinquished to them the whole of that debt, which was not more than a reasonable compensation for the nurture and education charged upon the residue bequeathed to her—that to induce the mother to do this, he had paid her £150. The Defendant denied that the Plaintiffs were entitled to any part of the £859, and averred that he had paid the Defendant *Thomas*, the younger, and the husband of *Mary*, their share thereof. It was in proof, that the intestate *Thomas*, the elder, had paid all the expenses of educating the three sons of his brother. It did not appear how much had been expended upon the education of *Mary*, but it was proved that she had married respectably.

No proof of any payments by the Defendant *William*, as alleged by him, was offered.

It appeared from the record of the cause, that the order of reference had been made at a former term, and that it was not renewed at the term immediately preceding that to which the report was returned. The Master, in his report stated, that as the Defendant *William*, the younger, was a resident of another State, he had served notices of the time and place of taking the account upon his Counsel in this Court.

Exceptions were filed to this report by the Defendant *William*.

1st. Because the Master had not allowed the Defendant the sum of £150 paid the mother.

2d. Because he had not charged the fund with the expenses of nurturing and educating the four youngest children.

3d. Because interest had been computed from a period before the bill was filed, viz.: from the year 1804.

4th. Because the order of reference was not renewed at the last term.

5th. Because notice of the time and place of taking the account had not been personally served upon him.

Badger and *W. H. Haywood*, for the Plaintiffs.

Seawell, for the Administrator of *Thomas Person*.

Ruffin, Judge, after stating the case as above, proceeded as follows: Upon the will, any residue remaining at the death of the widow, is clearly devisable amongst the surviving children equally. Up to that event, the profits belonged to the widow, and the whole was subject to the charge of educating the younger children. But the report is predicated on a false basis, the award and transfer of the debt by the mother There is no evidence of such a transfer. The Plaintiffs allege one to *all the children* then living. This is expressly denied by the Defendant *William*; and the Plaintiff has taken no proof. That Defendant admits, or insists on a different assignment, namely, one to the four children, excluding

Martha, and says that he paid £150 for it. Of this the Defendant has offered no proof; and being a new and distinct allegation, his answer to this point is not evidence. It is only evidence when responsive to the bill. It is not like one charging and discharging himself in the same breath, and from the same fact, standing as one admission. It is a denial of the Plaintiff's allegation, and then bringing forward a new fact, as a title in himself. There being no proper proof of any assignment, both are laid out of the case; which must be left to stand on the will. By that it is declared by the Court, that the Plaintiff, in the case which has happened, is entitled to one-third of the sum of £857. Consequently, the first exception is overruled. Then, as to the interest: it is to be observed, that the Defendant does not say, that he has not used the money; and he does not bring it into Court, and render an account. On the contrary, he denies the Plaintiffs' right altogether. Under such circumstances, he is chargeable with interest from the time the legacy became due to the Plaintiffs; that is, from the death of their mother. To that extent, the third exception is allowed; and overruled for the balance.

The second exception goes to the charge of education.—That was certainly to be defrayed out of this fund. But when a near relative, and the head of the family, takes the charge on his own private purse, it must be held to be for the benefit of the whole estate, and not restricted to be a personal bounty to particular children. It is most probable, that the understanding of the parties was, that this very debt of *General Person* should be paid in that way. If so, it was a most unpardonable and unconscientious advantage taken of his estate, to claim it after his death. But it is too late to consider that now. It has been settled, without any deductions for his disbursements for his nephews. How can his nephews ask now, that the allowance, instead of being made to him, should be given over to them? But if this were not so, it is plain that the expenses, contemplated by the testator in 1778, would not have exceeded the income from the estate. The tenant for life was therefore responsible, and the profits accruing in her time are adequate.—They are in the Defendant's hands, and must remain there, for any thing which can be decreed in this suit. The Defendant says, she surrendered them. We must take that for granted, until her representatives shall contest it. Admitting it to be so, those profits constituted a conpensation for the education, that is, such an education as the children could have got in the country at that time. This exception is therefore overruled. And the Master will immediately compute the legacy according to these directions.

The account here has been taken, according to the course of the Court. The order of reference need not be specially renewed at every term. The Defendant being a resident of another State, and having no agent mentioned of record, or known to the master or parties, it was regular to serve the notices to attend the Master, on the Solicitor or Counsel in Court.

Per Curiam.—Decree that the Plaintiffs are entitled to one-third of the amount of the award, and charge the Defendant, the administrator of *Thomas Person*, the elder, with interest thereon from the death of the mother in 1813, and an account is directed accordingly.

Margaret Arnett et al.
v.
Zachariah Linney, Ex'r. of William Linney, } From Iredell.

An executor who does not render an account, and swear that he has not used the fund himself, nor loaned it to others, but has kept it on hand for the purposes of his trust, is to be charged with interest from the date of his receipt of the trust money.

An executor who has used any part of the trust fund for his own advantage, must be held to a strict interest account, unless he keeps such account, and produces and verifies it before the Master.

This was a bill filed by the residuary legatees of *Wm. Linney*, who died in the year 1821, against the Defendant, his executor, for an account of his estate and payment of their legacies. The Defendant submitted to an account; but in his answer, did not give one, but merely referred to his vouchers, which were filed.

Upon a reference, the Master reported, neither party appearing before him—that from the papers on file it appeared, that the gross amount of the estate was $14,557 12, and the debts $1,020 33. Interest was charged the Defendant upon the several sums received by him from the day they came to his hands, and credited him on his disbursements from the time they were made. The same course was adopted as to several partial payments made to the Plaintiffs, and the result of the whole was, that the Plaintiff owed, of principal, to the Plaintiff *Margaret* alone, a balance of $417 62, and of interest $169 28. The Defendant excepted to the report, because of the manner in which the interest account had been settled.

Hogg, for the Defendant.

Devereux, *contra.*

Ruffin, Judge.—The only question in this case arises on an exception to the Master's report, charging the Defendant interest. The Defendant is an executor, who qualified in 1821. The Master charges him with interest on money received by him, from the day of the receipt, and in like manner gives him credit for interest on his disbursements, in paying debts, and for partial payment of the legacies, from the day of the disbursements. This is admitted to be generally right, when the executor renders no account, and has been dilatory in returning inventories, and paying the legacies. But it is said, that here the accounts taken by the Master show upon their face, that the Defendant distributed the money received by him amongst the legatees, so soon after it came to his hands, that it is apparent he could not have made profit. If we were certain of that fact, the exception would be allowed; because the profit, made by the trustee, is the foundation of the decree for interest against him. When he keeps the fund on hand ready for the legatees, and gives them early notice of it, or pays it upon application, he is not liable for interest. If he pays it over immediately, the interest being calculated on both sides produces the same result, that would follow the allowance of it on neither. If there be debts falling due, which require the money to be kept on hand to meet them, the executor is not chargeable with interest. For the situation of the estate requires him to keep a fund yielding no profit. But here the debts were very inconsiderable; and the estate large. If the executor, as between him and legatees, expects not to pay interest, it must not appear, that he has made any use, for his private advantage, of any part of the funds of his testator. If he has, he must be held to a strict interest account for the whole, unless he keeps such accounts, and produces and verifies them before the Master, as will show exactly what profit he has made. The fact is within the executor's own knowledge, and that of no other person. It is true in this case, that some of the payments of the legatees were made, so soon after parts of the funds came into his hands, that there was probably a distribution of the very money received. He loses the interest only on the time intervening between the receipt and payment, as the master has credited him with interest from the time of payment. But he ought not to lose that interest if his conduct was fair, and he actually kept the money on hand. With respect to other large sums, however, that is not the fact, for the difference on the interest account is upwards of $700; whereof the Plaintiff *Margaret's* part is $169 28. No account has been rendered by the Defendant before the Master; much less one from which the profits made could be ascertained. The Master has been under the necessity of stating the accounts *ab initio.* In such cases, executors must expect to be charged interest, unless they positively and unequivocally swear, that they have not used the money themselves, nor loaned it to others, but have kept it on hand for the necessary use of the estate. We are obliged to adopt this rule, to prevent executors from taking undue advantages; since it is impossible to trace the money, and prove the particular uses made of it by the executor. He can always exonerate himself by keeping fair accounts, and purging himself on his oath. In the present instance, it appears from some of the exhibits, that the Defendant and his agent have applied to their private use, at times, some portions of the money; and the executor has not personally appeared before the Master at all. The exception is therefore disallowed, and the report confirmed.

PER CURIAM.—Let a decree be entered according to the report.

William Lee
v. } From Chowan.
James Norcom,

Upon the removal of an Equity cause to this Court, under the act of 1818 (*Rev. C.* 962) the original papers are to be sent here—and if the Clerk below sends copies of them, the costs of the copies cannot be taxed.

This was a bill for an account of profits of lands, which the Plaintiff and Defendant jointly cultivated. The issue between the parties involved matters of fact only.

After the hearing, *Hogg*, for the Defendants, objected to the bill of costs which was sent up from the Court below, because notwithstanding the cause was removed to this Court for hearing, the Clerk and Master below had made out a transcript of the papers, instead of sending the originals, and had charged the usual costs of copies.

Devereux, for the Plaintiff, concurred with *Hogg*, in moving that the taxation be reformed.

Ruffin, Judge.—This cause was removed for original hearing in this Court, under the act of 1818. (*Rev. C.* 962, *S.* 5.) The construction of which is, that the whole case and the original papers are to be sent. It is not like an appeal. In this last, the decree is that of the Court below, and this Court reverses or affirms it. The pleadings and proofs must therefore remain below, as the foundation of the decree. But upon removals, the decree is altogether the act of this Court. The Clerk and Master of Chowan ought not, therefore, to have sent a *transcript*; and he cannot charge the parties the fee for making it. His bill of costs must be reformed by striking that item out.

Per Curiam.—Let the costs of the copies sent to this Court be stricken from the bill of costs.

Thomas W. Poindexter
v.
Isaac McCannon and Henry Hauser, } From Surrey.

Where, upon the face of a transaction, it is doubtful whether the parties intended to make a mortgage or a conditional sale, Courts of Equity incline to consider it a mortgage; because by means of conditional sales, oppression is frequently exercised over the needy.

But there is no rule of Equity, which forbids the making of conditional sales. And where the subsequent acts of the parties are consistent with the idea of a sale, a redemption is not decreed. For although the acts of the parties are never regarded at law as a rule of construction, yet in Equity they are considered as evidence of the intent.

Where, upon the purchase of a slave, a full price was paid, and no bond or covenant taken for the repayment of the purchase-money, in case of the death of the slave, and possession was given immediately, *held*, that these circumstances, added to the fact that the buyer was necessitous, and that twelve years had elapsed before redemption was claimed, proved that a clause, whereby the seller reserved to himself the power of annulling the bargain, did not render the transaction a mortgage, but a conditional sale—to claim the benefit of which, there must be a strict performance by the seller.

This bill was filed in October, 1823, to redeem a negro man slave, which the Plaintiff alleged he mortgaged to the Defendant *McCannon*, on the 13th of September, 1810, and which *McCannon* sold to the other Defendant on the 14th September, 1811. The bill alleged that the Plaintiff was indebted to *McC.* in the sum of $150, and wanting money, he borrowed $153 more from him, and to secure the payment of the whole, agreed to mortgage to him the negro in question, then a likely boy about 16 years old, and worth $500. That accordingly he made him a bill of sale, expressed to be in consideration of $400, and put the negro immediately into *McCannon's* possession, upon an agreement which was charged to be usurious, that his hire should extinguish the interest. It averred expressly, that the agreement was for a mortgage to secure the debt of $303. The deed was exhibited by the Defendant, and was absolute upon the face of it. But there was an endorsement on it, in these words: "N. B. If the above bound *T. W. Poindexter* pay up to the above named *J. McCannon*, the sum of four hundred dollars, within twelve months from the date hereof, the above bill of sale to be void, and the negro boy returned." The Plaintiff further alleged, that in 1814, he tendered to both of the Defendants, the money due on the mortgage, which they refused to take.

McCannon, in his answer admitted the bill of sale, and the *nota bene*. But he denied positively, that it was a mortgage, and affirmed that it was a purchase by him for full value, with an agreement to re-sell at any time within a year, at the same price. He averred that the plaintiff wished to give a mortgage, but that he refused to treat on such footing; and after they had contracted, upon redemption at an indefinite period being mentioned by the Plaintiff, he *McCannon*, refused to complete the purchase. And that finally, the Plaintiff agreed to make a sale, if he *McCannon*, would consent to re-sell to him, as above mentioned. He denied that he made any loan to the Plaintiff; and averred that the Plaintiff owed him about $225, for land sold to him. That he then paid the Plaintiff a sum of money, and gave him an order on his father's executor for $86 50, being the full balance of the rice of $400. He likewise averred, that he then surrendered all the evidences of his previous debts, as hey were satisfied in the price of the slave. He admitted, hat in 1814, Plaintiff pretending that the conveyance was a mortgage, said that if he, the Defendant, did not make good the order for $86 50, he would sue for the negro. He denied the tender of the money, and averred that although he did not then feel bound for the order, yet as the Plaintiff was his brother-in-law, and he wished for peace, he authorised a mutual friend to pay him the principal and interest on it, if the Plaintiff would abandon all claim; which was accordingly soon after done. He further stated, that wanting money himself, before September, 1811, to discharge an execution against him, he applied to the Plaintiff to rescind the contract, and take the negro back; and received for answer, that he might sell the negro, for that he, the Plaintiff could not re-purchase him. That upon this, he made the sale to the other Defendant, for the same price of $400; but that the Plaintiff might have still further time, he annexed to the bill of sale to *Hauser*, a similar condition to that which was annexed to the one to himself. And he averred, that neither he nor *Hauser* imagined, that either deed constituted a mortgage, and admitted, that he considered his contract with *Hauser* as a sale.

The answer of *Hauser* did not vary the case, but corresponded with *McCannon's*, as to those parts of the transaction in which he had a personal agency.

Replications were filed to the answers, and testimony taken which will be found stated in the opinion of the Court.

Winston, for the Plaintiff.

Gaston & Devereux, for the Defendants, cited *Coke L.* 205 *a.*—*Bonham* v. *Newcomb*, (1 *Vernon* 7, 214, 232) *Mellor* v. *Lees* (2 *Atk.* 494) *Vernon* v. *Winstanly* (2 *Scho. & Lef.* 393 *Goodman* v. *Grierson* (2 *Ball & Bea.* 274) *Conway* v. *Alexander* (7 *Cranch* 218.)

RUFFIN, Judge, after stating the case as above, proceeded: A mortgage and a conditional sale are nearly allied to each other, and it is frequently difficult to say, whether a particular transaction is the one or the other. The difference between them is, that the former is a security for a debt; and the latter is a purchase for a price paid, or to be paid, to become absolute on a particular event; or a purchase, accompanied by an agreement to re-sell upon particular terms. It is the latter kind that runs so nearly into a mortgage. For, as needy and distressed men are those who are commonly drawn into such contracts, and the very anxiety to get their estates again, which produces a stipulation to that effect, denotes either that it was favorite property, which the party did not intend to part from conclusively, or that the price was so inadequate, as to make it material, in point of interest, that they should have the power to reclaim. Courts lean towards considering them mortgages. But there is no rule of law, that a sale shall not be made conditionally. In each case, the only difficulty is, to ascertain the character of the transaction. When it is once determined to be a mortgage, all the consequences of account, redemption, and the like, follow, notwithstanding any stipulation to the contrary. For the power of redemption is not lost by any hard conditions; nor shall it be fettered to any point of time, not according to the course of the Court. This is well expressed in the familiar maxim, "once a mortgage, always a mortgage." In the present case, the clause inserted in the deed may well consist with a contract of either description. It is equivocal in itself. But it is sufficient to induce the Court to decree a redemption, if nothing else appeared, because the Court inclines to that side, to prevent oppression and hard dealing. It is, however, susceptible of variation by the acts of the parties, and the circumstances attending the transaction, which show it to be the one or the other. I do not mean, that it can be contradicted by the testimony of witnesses, to show either that the bargain was different from that expressed, or that it was meant to be, unless there be fraud. But I mean, that the parties' acts and their dealings are material to show the intent. *Streator* v. *Jones* (3 *Hawks*, 423) for instance, is a case where an absolute deed was held a security, upon evidence of lending and borrowing between a needy man on one side, and an habitual and hard lender on the other; of great inadequacy of price, if it was a price;

and of the possession of the land by the bargainor, after he made the deed. As *Sir James Mansfield* says (*Iggulden* v. *May*. 2 *New Rep*. 449) the conduct of the parties can never be looked to, to fix a construction at law upon their deeds, as had been done in *Cooke* v. *Booth* (*Cowp*. 819.) But in Equity, their conduct is often regarded as evidence of the intent of making a contract. Now, what are the usual badges of a mortgage ? They are, that there is a previous debt, or a present advance of money upon *loan* ; for which some evidence is taken, obliging the borrower personally to the absolute payment. There is a bond for the debt ; or a covenant in the mortgage deed for the payment. This is usual, where the security by mortgage is taken on landed property. Much more should we expect to find it, where the security is on a slave, who may die the next day. It is always a question, in mortgage or no mortgage—whose loss will it be, if the thing is destroyed. If that of the maker of the deed, then it is a mortgage. Again, one of the most difficult situations that can be, is that of a mortgagee in possession. He is subjected to an account, generally the most rigorous and under great disadvantages ; for he is liable not only for profits made, but that might be made ; and profits are always greater to standers by, who have a high opinion of their own management, than they are in reality to those who work. Hence, a mortgagee never takes possession until he is obliged. Nor is a mortgagor more willing to go out of possession, and give up the management and present use of his property. The one does not surrender, nor the other take possession, but as the last alternative. And we may almost venture to assert, that no mortgagee or mortgagor ever yet made a contract, upon which the possession was to change immediately, unless it were the veriest grinding bargain, that could be driven with a distressed man, who had no way to turn. When to this is superadded, that a fair and full price, $400 was paid, it seems impossible to believe, that it could be on loan. That this price was paid, is fully proved by the Plaintiff's own brother, who was present at the treaty, and wrote the deed. I do not refer to his deposition, for the sake of what he says was the understanding of the parties; though in that respect he supports the answer; but to get at the acts of the parties. He proves, that they came to a settlement, not to ascertain the debt due to the Defendant, that it might be secured; but to ascertain its amount, that it might be known how much would remain to be paid in money. Upon that settlement, all the old bonds were given up, and no new one taken. Part of the debt was for the price of land. Would the Defendant have relinquished his equitable lien on that, for the precarious security of a mortgage on a slave, for that and other advances to the full value? The Defendant likewise took immediate possession.

Here, then, it appears, that instead of a *security* for a debt, the slave was partly a *satisfaction* of a pre-existing one; and the balance was then paid. If the Plaintiff had been borrowing, and pledging his negro as a security, would he have received so large a part of the loan in an *order?* Such a payment might be expected to be received. But such a loan is out of the way of business. The subscribing witness is supported by several others, in his statement of the value of the negro and of the Defendant's possession. The sum advanced was the *full* value. These circumstances satisfy me, that a redemption was never intended. And the sale by *McCannon* to *Hauser* at the same price removes every appearance of it. He might have taken the negro in payment and advanced the difference; because he could then sell himself again after a reasonable time. But the idea is preposterous, that a man, who was himself obliged to raise money, would surrender a good security on land, for the purpose of getting a mortgage on a negro, which, as mortgaged property, he could not sell. Without citing particular cases, I will only refer to the general principles collected from them by *Mr. Butler*, in his note to *Co. Litt*. 205 *a*. The circumstances here repel every idea of a mortgage, or of a security redeemable at an indefinite period. The old securities were given up, and no new one taken; the price paid was a full one; the purchaser himself was necessitous, and obliged to part from property to pay his own debts; he took immediate possession; and actually made sale of the negro the day after that limited for the Plaintiff's re-purchase; and upon such sale only got his own money back; and this was twelve years before this suit was brought. If this cannot be considered a purchase, then there can be none, unless it be absolute at the making up of it and forever.—The Plaintiff has no case; and his bill must be dismissed with costs.

Per Curiam.—Let the bill be dismissed with costs.

Richard Newsom and Mary his wife, et al.
v.
William Bufferlow,
} From Northampton.

Equity relieves against mistakes, as well as against fraud in a deed or contract in writing; and parol evidence is admissible to prove the mistake, though it is denied in the answer; and this, when the Plaintiff seeks relief, affirmatively on the ground of mistake.

As where the owner of two adjoining tracts of land, having sold one of them, in describing the metes and bounds in a deed executed to the purchaser, by mistake included both tracts. The proof of the mistake being perfectly satisfactory, the vendee was decreed to re-convey to the vendor the tract of land not intended to be conveyed.

The Plaintiffs, in their bill, alleged, that *Jesse Webb*, the first husband of the Plaintiff, *Mary*, and the father of others of the Plaintiffs, being the owner of one tract of land, purchased an adjoining tract of one *William Amis*, and to secure the purchase-money, conveyed both tracts to one *John D. Amis*, in trust, in the usual form ; that afterwards, with the consent of the trustee, he sold the land purchased of *Amis*, to the Defendant—but that when he executed a deed for the land so sold, through mistake or fraud, the courses of the deed of trust executed by *Webb*, to *John D. Amis*, were copied, instead of those of the deed from *William Amis* to *Webb*, and thus that all the land which he, *Webb*, owned, was conveyed by that deed. The death of *Webb*—the intermarriage of the Plaintiff, *Newsom*, and *Mary*, and the descent from *Webb* to the other Plaintiffs, were then alleged—and also the fact that the Plaintiff, claiming both tracts, had brought an ejectment (1 *Law Cases*, 208) against the Plaintiff, *Newsom*, who was in possession under an assignment of dower to his wife, and was pressing the same to a trial.

The bill prayed, that the Defendant might be enjoined from proceeding at law—and also that the mistake in the deed might be corrected.

The Defendant, in his answer, positively affirmed, that the deed executed to him by *Jesse Webb*, in his life time, was in exact accordance with the understanding and design of the parties thereto, and that it conveyed all that was intended to be conveyed thereby, and no more.

Upon the coming in of the answer, the injunction was dissolved with costs. But upon the motion of the Plaintiffs, the bill was held over as an original, and a replication to the answer was filed. Many depositions were taken ; but it is not necessary to state them in detail, as the Court, on the hearing, were clearly satisfied that the Plaintiffs had established every part of their case.

Seawell, for the Plaintiffs, cited *Henkle* v. *Royal Ex. Ass. Co.* (1 *Ves. sen.* 319.)—*Townshend* v. *Strangroom* (6 *Ves.* 328.)—*Baker* v. *Payne* (1 *Ves. sen.* 459.)—*Simpson* v. *Vaughan* (2 *Atk.* 32.)—*Burn* v. *Burn* (3 *Ves.* 573.)—*Gillespie* v. *Moon* (2 *Johns. C. R.* 585.)—*Pitcairne* v. *Ogbourne* (2 *Ves.* 377.)

Badger, for the Defendant, referred to *Rich* v. *Jackson* (4 *Brown C. C.* 514.)—*Woollam* v. *Hearn* (7 *Ves.* 211.)

Hall, Judge.—It is altogether unnecessary to enquire, in this case, how far Courts of Equity have gone, in carrying into effect written executory contracts, or varying them by parol evidence. Suffice it to say, that the reason why they have declined giving relief in many such cases is, that the Plaintiff *had a remedy at law.* That reason is not applicable to executed contracts. In these cases, the Plaintiff has no remedy at law; and unless a Court of Equity will give relief, he can have no redress. For this reason, it is well settled, that a Court of Equity will reform a written executed contract like the present. And generally, where a clause is either inserted in a deed, or is omitted, through fraud or mistake, Equity will give relief. The authorities, in support of this position, are collected in *Newland on Contracts, p.* 346, and *Sugden's Law of Vendors, p.* 97.—The case of *Gillespie* and *wife* v. *Moon* (2 *Johns. Ch.* 585) is in point. There a deed was executed by mistake for two hundred and fifty acres of land, when it ought to have been for two hundred only. Parol evidence was let in to prove the mistake although it was denied by the answer. Upon the same subject, see *Souverbye* v. *Arden* (1 *Johns. Ch.* 240, 252.)—*Getman* v. *Beardsly* (2 *John. Ch.* 275.)—And *Lyman* v. *United Ins. Co.* (*Do.* 630.)

His Honor then recapitulated the facts of the case, and proceeded:—

Without recapitulating the testimony offered by the Plaintiffs in this case, it may be assumed as a fact, beyond rational doubt, that the course of both tracts of land, instead of the one purchased of *William Amis*, were, through fraud, or to say the least of it, through mistake, inserted in the deed to *Bufferlow*. It is to be regretted, that the courses of the other tract of land have not been set forth in the bill, or otherwise made to appear to the Court. A re-conveyance of that land, to be made by the Defendant, cannot be, for that reason, decreed at this time. To ascertain them, let a commission issue to the County Surveyor, to make a survey of that land, and ascertain the boundaries, with directions for him to return a plot and survey of it to the next term of this Court; unless, in the mean time, the parties agree upon the boundaries of the tract of land, which was intended to have been conveyed, viz.: the land which *Webb* purchased of *William Amis ;* and let the costs of this suit be paid by the Defendant.

Per Curiam.—Decree accordingly.

David L. Ryan
v.
Clement H. Blount, Ebenezer Pettigrew et al. Ex'rs. of John Beasley, } From Bertie.

An award may be corrected for error in law, where it appears on its face that the arbitrators intended to decide according to law, but have made a mistake.

Interest is not of course to be compounded in favor of a ward against the executors of his guardian, but simple interest only is to be computed from the death of the latter, unless compound interest was received.

Ordinarily, a guardian is to be charged with compound interest, but he may be exempted from it by proving that, after suitable exertions, he was unable to realize it.

No decree can be made against one on whom process has not been served, unless he has entered an appearance.

The Plaintiff in his bill alleged, that *David Ryan*, his father, had died in the year 1802, having made a will whereby he bequeathed the whole of his personal estate to the Plaintiff and another son, and appointed his wife *Mary B. Ryan*, executrix—that the executrix never in any way managed the said estate, but confided the whole thereof to her brother *John Beasley*, the testator of the Defendants, who had also procured himself to be appointed guardian of the Plaintiff—that *Beasley* had never accounted for the assets of *David Ryan*, which had come to his hands, neither had he in any way settled his accounts, as guardian of the Plaintiff, nor made any returns, so as to enable the Plaintiff to charge him with the receipt of any precise sum. The prayer of the bill was for an account of *David Ryan's* personal estate, and also of the Plaintiff's estate, received by the Defendant's testator, as guardian.

Process issued upon this bill, and was served on all the Defendants but *Pettigrew*, who never entered his appearance.

No answers were filed by any of the Defendants; but by an agreement, signed by the Plaintiff and all the Defendants, except *Pettigrew*, the matters in difference between the parties, were referred to arbitration.

On the Fall circuit of 1829, the arbitrators returned their award, accompanied by an account of the funds with which the Defendant's testator was chargeable; from which it appeared, that they had ascertained that the sum in the hands of the latter, due the Plaintiff, on the 1st of January, 1815, to be $2,236 05, upon which they had allowed the Plaintiff compound interest, up to the 1st of January, 1829, amounting in the whole to $5 055 36.

Upon the coming in of this award, before his Honor Judge DANIEL, it was objected to the award by the Defendant's Counsel, that the award should be set aside, as to that part thereof wherein the Defendants were charged in the report made by the said arbitrators, and filed in the cause, with compound interest from the 1st day of January, 1815, to the

1st day of January, 1829, and the said report being examined by the Court, and it appearing to the Court, that the Defendants were charged with compound interest, from the said 1st day of January, 1815, to the said 1st day of January, 1829, (*John Beasley*, the guardian of Complainant, having died about the 1st day of January, 1815) and it appearing to the Court, that the arbitrator did so charge the Defendants with compound interest ; and it appearing further to the Court that the arbitrators undertook to decide according to principles of law, and they mistook the law in so charging the Defendants with compound interest : It is ordered and decreed, that the award be set aside as to that part thereof, the Court being of opinion. that the Defendants are chargeable with simple interest only, from the death of the guardian. And now a computation being made by consent at this term. charging the Defendants with simple interest only, from the 1st day of January, 1815, whereby it appears that the sum $3,761 58, was due Complainant on the 1st day of January, 1829, according to the award, and according to that method of computation, of which sum $2,044 34 is principal ; and it is ordered and decreed, that the award in all other matters and things be confirmed.

Whereupon, it is ordered and decreed by the Court, that the Complainant, *David L. Ryan* do recover of the Defendants, *James Iredell, Clement H. Blount* and *Ebenezer Pettigrew*, executors of *John Beasley*, the said sum of $3,761 50, with interest, &c.

From this decree, so far as it directed the award to be set aside, as to the compound interest charged the Defendants, the Plaintiff appealed.

Gaston, for the Plaintiff.
Hogg, for *Pettigrew*.
Badger, for the other Defendants.

HENDERSON, Chief Justice, after stating the case as above proceeded :—If in fact it did appear upon the award, where alone the Court can look to find it, that the arbitrators decided according to law, and mistook the law, the error may be corrected ; for thereby the award is not varied from what the arbitrators intended, but it is made to be what they designed it should be. But no such intent appears upon the award, or otherwise as we can perceive. The Court must have come to that conclusion by conjecture, or by evidence *aliunde ;* neither of which sources will do. It must plainly appear upon the award ; otherwise it is taken that the arbitrators intended to be governed by their own rules or notions of right. Both the law and the facts are referred to them. And where there is no fraud or mistake, the latter to be ascertained as before stated, the award is conclusive. It is in their judgment as to both, that the parties confide. It is quite possible, nay, it is probable, that the arbitrators intended to be governed by the law on the subject of interest. And if they did, the compounding of the interest against the Defendants as a *matter of course* was an error. For although they represented him who had been guardian, and who as such *prima facie* was chargeable with compound interest, the compounding of the interest as a matter of course should cease with his guardianship. When I say compounding interest ceases as a matter of course, I mean to say, that his executors are not to be charged with compound interest unless it is shown that they had made it. Neither do I mean to say, that a guardian is in all cases to be charged with it. *Ordinarily he is.* But he may be *exempted from it by showing that he has been unable to make it, after using his best exertions to do so.* Why these arbitrators charged the Defendants with compound interest we know not. It might have been by mistake. It might be because the ward's property produced it in their hands. We cannot therefore even say, that this award has not met the actual justice of the case according to our own notions. Much less can we say, it did not according to the notions of the arbitrators, who are judges of the parties' own choosing. The decree must therefore be reversed, and decree according to the award, except so far as it is awarded against *Mr. Pettigrew.* Against him there can be no decree, nor can he be otherwise affected by the decree, than the decree against his co-executors affects the assets of the estate. Of course it affects the assets in his hands. Nor does the award affect the other executors personally. The decree must therefore be against the assets in their hands. The question of assets is left entirely open.

PER CURIAM.—Decree of the Court below reversed, and decree for Plaintiff for the sum of $5,05536, with interest, &c. to be levied of the assets in the hands of the Defendants.

John Reeves et ux. et al.
v.
Thomas Reeves et al.
} From Orange.

Every testator is presumed not to intend to die intestate, as to any part of his estate. Therefore, a residuary clause, unless expressly restrained, always passes whatever is not otherwise disposed of.

Parol evidence is inadmissible to prove, that the intention of the testator was not properly expressed in the will; or that he used words, the meaning of which he did not understand.

The Plaintiffs in this bill averred, that *Thomas Lynch* duly made and published his last will—whereby, after devising three hundred acres of land to his brother *Jesse Lynch*, he proceeded as follows: "I give all the balance "of my land, with the appurtenances thereof to my bro-"ther *Moses.* I also give him my negro man *Jim*, with "all my stock of all kinds, with the balance of all my "property, to my brother *Moses.* That the second claus "of this my last will and testament may be properly understood, I wish my brother *Moses* to inherit all my property, "except the three hundred acres of land mentioned in the "first clause, given to my brother *Jesse.*" That he appointed his brother *Moses* executor, who dying shortly after the testator, the will was proved by the Defendant, *Reeves*, who took out letters of administration, with the will annexed. That at the time of making the will, the testator had in his possession only one slave, the negro *Jim*, but was entitled to sundry others, which were held adversely to him. That the will was written by the Defendant, *Reeves*, who, at the time of writing it, asked the testator what he intended to do with the other negroes which he claimed, but which were not in his possession, and received directions to say nothing about them in the will; the testator adding that they were not in his possession, and he never intended to trouble himself about them—that if he had them in possession, he should not leave them to his brother *Moses*, and that if they were recovered, they would be divided among his other brothers and sisters. That after the death of the testator, suit was commenced for the said slaves by Defendant *Reeves*, which eventuated in his favor.

The Plaintiffs were the brothers and sisters, and the husbands of the latter, of the testator, who died without issue, and unmarried. The other Defendants, besides *Reeves*, were the children of *Moses*, the residuary legatee. The Plaintiffs contended, that the negroes recovered by the Defendant *Reeves*, did not pass as a part, of the residue of the testator's estate—because the words of the residuary clause were general—or, if they did pass by it, that it was drafted so as to include them by mistake.

The Plaintiffs sought an account of the negroes recovered by the administrator, and of their hire, and for a distribution of the amount.

The Defendant, *Reeves*, in his answer, admitted the whole of the case made by the Plaintiffs.

The other Defendants denied the conversation alleged to have taken place between the testator and the Defendant, *Reeves*, and averred, that on the trial of the suit brought by him for the negroes now claimed, the Plaintiff, *John Reeves*, who was the father of the Defendant *Thomas Reeves*, was offered as a witness, and on his *voir dire*, swore he was not interested in the event of that suit, as the negroes, if recovered, passed by the residuary clause of the testator's will, to his brother *Moses*. They also averred, which was admitted to be the fact, that an issue of *devisavit vel non*, as to the will of the testator, between the Plaintiffs and the Defendants, *Reeves*, had been found in the affirmative.

Replications were taken to the answers. The testimony was principally confined to some declarations of the testator, as to his intentions in disposing of his property, made before the execution of the will.

Nash, for the Plaintiffs.

Badger, for the children of *Moses Lynch*.

Ruffin, Judge.—The construction of the will cannot admit of a doubt. It may seem singular enough, that the testator should, in a clause intended to pass many negroes, expressly mention but one of them. It is argued from thence, that he had not *animum disponendi* as to those not mentioned. But it is to be remembered, that every testator is presumed not to intend to die intestate, as to any part of his estate; and therefore that a residuary clause is always, unless expressly restrained, held to pass whatever is not otherwise disposed of. If there was nothing particular therefore in this will, there could be no question. But there seems to have been more than ordinary anxiety in the testator's mind, that this meaning should be given to his will; for after giving all the balance of his property to *Moses*, he declares that he desires this to be properly understood, and that it may be, he repeats that his meaning is, that *Moses* shall *inherit* all his property, except the land given to *Jesse.* Surely this must take all.

Then as to the parol evidence and answer of the administrator, to vary this construction: it is impossible that the idea should be admitted for a moment. It would be to upset all wills by the loosest of proof. If there was anything in it, there was an opportunity, on the probate of the will, to make the most of it before the jury: who, if satisfied of any fraud, might have found part to be the testator's will, and part not. But it would be extremely dangerous, entirely too much so, to say, that the testator did not devise, because, in law, the paper would pass a larger estate, and more property, than witnesses supposed the maker of it meant. The meaning of the testator is to be judged of by his written words; and they must stand, unless it be shown that he was imposed on, and did not know they were in his will; or knowing that they were there, that he had been induced by undue influence to execute it against his own wishes: which goes on quite a different ground, namely, weakness. I lay out of the case the depositions, because they go only to preceding intentions, and are contradictory. The case then stands on the answer of the administrator.

That represents, that the testator did not intend to bequeath certain of his slaves; but nevertheless made his will with a general clause, which does pass them. The subject was pressed on his notice several times; and he ordered, that nothing should be said upon it in the will; and declared that when they were recovered, he intended them to be divided amongst his other brothers and sisters. Yet he executed his will; and that in his senses, and without imposition, as must be taken now from the solemn probate. The two positions cannot stand together; and of the two, that founded on evidence the more fallacious must yield. This is not at all like the cases of *Oldkam* v. *Litchfield* (2 *Vern.* 506) and *Barrow* v. *Greenough* (3 *Vesey*, 152.) In each of them, the testator intended to enlarge certain legacies, and with that view to alter his will. This he communicated to the devisees and residuary legatees to be affected thereby; and each promised the testator, if he would not make the alteration, that his wish should be observed; and in confidence thereof, the testator suffered things to remain as they were. Now, this was a plain engagement, in the nature of a contract; and it would have been a gross fraud, if not performed, to have drawn the testator into such a trap. In the latter case, much of the proof appeared in writing; being contained in a letter from the legatee to the testator. I am not certain, that the first case would, at this day be supported; because the evidence was wholly in parol. Not because of the statute of frauds merely; because there can be no doubt, that a fraud or a mistake is without that statute; but because such a fraud, or a mistake of that nature, ought to be made out by the strongest possible proof; and I do not know that, weighing the evidence judicially, any parol proof would avail to overset a written will, left uncancelled, or unrevoked by the testator. But here it is quite another matter. This is no attempt to raise a trust in the legatee, upon the ground of any fraud or promise *by him*. On the contrary, it is plainly and merely to alter a will by parol proof, that the testator used broader words than expressed his intention. It does not even go to the extent of showing, that the testator did not know what words he used; but only that he did not know the sense of them. The will cannot be contradicted, nor the construction thus varied upon parol proof. I call the evidence parol, although it is contained in the answer of the draughtsman of the will, and the now administrator of the testator. He has no interest in the matter, as he derives no benefit under the will. He is a mere executor in trust, and therefore his answer is no more than the deposition of another witness. And this very case exemplifies strongly the wisdom of the general rule, as to the strength and extent of the proofs, which Courts ought to require in such cases.—Here comes forward a Defendant, and admits the Plaintiffs case. It turns out, that when this Defendant, as administrator, was suing a third party for the very negroes now in dispute, his title to them was made out by the evidence ot the present Plaintiff, who then swore he had no interest, as the residuary clause of the will passed the negroes to another person. No sooner are the negroes recovered upon that testimony, than he asserts the will to be invalid, because the testator was *non compos mentis*. Failing in that, his next step is to assert a direct ownership, by way of trust, on the ground, that the testator did not know the meaning of his own will; and relies upon the answer of the administrator, who is his son, to show it. No one can fail to believe for a moment, that this whole career had been marked out between this father and son, from the beginning. The will is permitted to stand undisputed, while the father's competency depends on it. The effort, then, is to get clear of it altogether, because it serves their turn no longer. Next, and lastly, it is to make out a mistake in it, by the admission of the Defendant. Who could hesitate to anticipate the admission? It happens here, that the combination is easily detected. I am apt to conclude, that it almost as certainly exists in every other case of this sort, though it may be concealed by a veil not quite as transparent. At all events, it may easily exist and elude discovery, and therefore ought to be suspected. Men in their senses are in little danger of giving away more property in their wills, than they intended; and upon a change of mind, are ready enough to express it in the will itself. But if it were otherwise, it is better that a particular mischief should be suffered, than a general inconvenience introduced. The proof ought to be as clear as day. It ought to shed a blaze of light, unobscured by a single cloud of doubt, upon the very point of controversy.

The bill must be dismissed with costs, as to all the Defendants, but the Administrator, *Thomas Reeves*. He, being a party in interest and feeling with the Plaintiff, must be content to pay his own costs.

Per Curiam.—Decree accordingly.

—o—

James Iredell et al, Ex'rs. of Samuel Tredwell *v.* John Langston. } From Chowan.

S. C., by his will, gave legacies to the children of J. C. The children died intestate, leaving their father the next of kin. The executor of S. C. having obtained a decree against J. C. for a mortgage debt, died, and appointed the Plaintiffs his executors. J. C. died also insolvent, leaving the debt unpaid; and the Defendant having administered on the estates of the children of J. C. upon a petition in the County Court, obtained a decree for their legacies against the Plaintiffs, who thereupon brought their bill to set off the decree in favor of their testator against that for the legacies—alleging that there were no debts due from the estates of the children of J. C., and that his estate was beneficially entitled to the whole of the legacies *Held*, that the Plaintiffs were entitled to the relief sought, which was nothing more than subjecting the funds of an insolvent *cestui que trust*, in the hands of his trustee, to the payment of his debts.

Where the Plaintiff and Defendant have mutual judgments in different Courts, and the Defendant is insolvent, a set-off will be allowed in Equity.

The case of *Holding* v. *Holding* (1 *Murph.* 1) approved by Henderson, Chief-Justice.

The Plaintiffs alleged that their testator was the executor of *Stephen Cabarrus*—that *John Charrier* was a legatee of the said *Cabarrus*, and made large purchases at a sale of his effects, to secure which, he executed two bonds to their testator for $2,000 each—that *Cabarrus*, by his will, also gave legacies to *John B.* and *Justina Charrier*, children of *John Charrier*—that their testator, in his lifetime, procured a decree of foreclosure upon a mortgage given by *John Charrier*, to secure the payment of the two bonds of $2,000, and a sale of the mortgaged premises was made, under an order of the Court of Equity—that, after deducting costs and discount, there remained due of the original debt, after applying to it the net proceeds of the sale, the sum of $634 11—that *John B.* and *Justina Charrier* died intestate, without issue and unmarried, and not indebted, leaving their father, *John Charrier*, surviving them, who afterwards died intestate and insolvent—that the Defendant had taken out letters of administration upon all their estates and had recovered a judgment against the plaintiffs, upon a petition in the County Court, for the sum of $946 37, the amount of the legacies given to his intestates. *John B.* and *Justina Charrier*, by *Cabarrus*, of which the Plaintiffs paid all but a sum equal to that due them by the intestate *John Charrier*. And the plaintiffs prayed, that the debt due them by *John Charrier* might be set off against the residue of the judgment, recovered against them by the Defendant.

The Defendant admtted all the allegations of the Plaintiff's bill; but denied their equity, averring, that the intestates, *John B.* and *Justina Charrier* owed him the Defendant, as did *John Charrier*, the father—to whom the Defendant had also made advances, after the death of his children.

The case was heard upon the bill and answer.

Hogg, for the Plaintiffs.

Kinney, for the Defendants, cited *Bishop* v. *Church* (3 *Atk.* 691) *Holding* v. *Holding* (1 *Murph.* 1.)

Henderson, Chief-Justice, after stating the case proceeded as follows:

It appears to us that the Plaintiffs have a very plain equity. It is nothing more than subjecting the funds of an insolvent *cestui que trust,* in the hands of his trustee, to the payment of his debts. Nor does the case of *Bishop* v. *Church,* relied on in the argument for the Defendant, touch the question. There the assignees of the bankrupt did not hold the estate in trust for the bankrupt, but for his creditors, of whom the Plaintiff was one. It was not pretended that whatever money he was entitled to receive, as his dividend of the bankrupt's estate, was in jeopardy. It was a mere attempt to induce a Court of Equity to set off debts at law, where the law afforded complete relief. The very basis of equity was wanting ; viz. : the insolvency of his debtor. As the debt, which was due the bankrupt, was not going into the hands of the bankrupt, as here it is to *John Charrier's* administrator, but into the hands of the assignees, who held in trust, not for him, but for his creditors. Whatever clear sum, therefore, belonged to *John Charrier,* in the hands of the Defendants, this Court will apply to the payment of the Plaintiff's decree. An account must therefore be taken of the estates of the infants, and what debts are chargeable upon them, regardless of their dignity ; for *Charrier* could only claim the surplus, after *all* the debts are paid. As to the debts due from *Charrier* himself to the administrator, since he became administrator, I am inclined to think that he will be entitled to retain. For I look upon them as advances made upon the credit of the funds in his hands, rather than as debts, I feel more difficulty as to the debts which *John Charrier* owed to the administrator, contracted prior to that time. I doubt whether a creditor can call the fund out of the hands of the trustee, without paying all the debts of the *cestui que trust* to the trustee. Whether this case presents a more favorable aspect for the Plaintiff, I cannot now say. Let an account be taken of the sums due upon the two decrees ; also of the estates of the intestates, and of their debts ; of the debts due from *John Charrier* to the administrator, and of the advances by the administrator to him, distinguishing between those contracted or advanced, before and after administration upon the estates of his children was committed to the Defendant. If the parties wish, although I think it of no importance, the nature and dignity of the debts will be stated by the Master.

It was contended in argument, that if the subject matter of this bill forms any ground of relief, it also afforded matter of defence to the administrator's suit, by way of petition. For that petitions are on the Equity side of the Court *quoad hoc.* And the case of *Holding* v. *Holding* was relied on: That case is law. There the matter set forth in the bill was properly a defence, *suo vigore.* It was in *opposition* to the *cause* of action, and should have been made, wherever the action was brought. It was like *payment*, in an action on a bond, or any other *discharge* of the obligation. The ground, on which this application is made, admits the demand. It does not resist the right of recovery. It only goes to extinguish the debt when recovered, by means of a separate and distinct demand. It is even stronger than the case of a set-off, for the demands are in different rights. But if it was no stronger, a person is not obliged to set off a debt. He may do so ; or he may sue upon it. The case of setting off one recovery against another is common in Courts of Law. Here the Plaintiffs were obliged to come into this Court, to show the *real creditor* in the petition. And besides, it is the case of judgments in different Courts.

PER CURIAM.—Decree accordingly.

John Dawson, Jesse A. Dawson, and Martha Dawson
v.
Sally Dawson, Evelina Alston, and George Alston,
From Halifax.

Volunteers, who claim under a deed of gift, executed under the impulse of feeling, rather than the convictions of the understanding, in which, apparently the grantor did not exercise perfect free will, are not aided by a Court of Equity.

After the demurrer to this bill had been overruled (*Ante p.* 93), the Defendants filed their answers, in which they admitted that the commissioners were requested by them, in making a division, to allot to the Defendant, *Sally*, the negroes which had belonged to her before her marriage—and that out of twenty-eight slaves, which were assigned her in the division, eight only had been the property of her deceased husband.

The Defendant, *Sally*, in her answer, stated, that soon after the death of her husband, the Plaintiff, *Jesse*, who had been upon terms of intimacy with her husband and herself, ceased to frequent her house, and she learned that he felt great dissatisfaction at the disposition which her husband had made of his property—and particularly at the liberal provision he had made for her—that being much afflicted at the death of her husband, her distress was aggravated at this alienation of the Plaintiff, *Jesse*, his brother—and that she became very desirous to conciliate him—that she accordingly requested him to visit her, and told him, that to preserve the peace of the family, she was willing to relinquish all her right to the property which had belonged to her husband—that actuated by these feelings, she did, within a month after her husband's death, execute the deed mentioned in the bill.

Replications were filed to the answers, and amongst other proofs, that of the person who drafted and attested the deed that was taken. He stated, that the Defendant, *Sally*, from the death of her husband up to the time when the deed was executed, was in great distress, which was much heightened by the dissatisfaction, expressed by the Plaintiff *Jesse*, with the provision which his brother had made for her—to remove which, and to restore the good understanding which had subsisted between them, she was prevailed upon to execute the deed—that when the witness was about to draw it, the Plaintiff observed to him, that his sister, the Defendant, *Sally*, wished to give up a part of the land and negroes, which she had received under the will of her husband—that the Defendant replied, "No, *Mr. Dawson*, I do not wish to do it, I do it for the sake of peace"—upon which, the Plaintiff's countenance bespoke anger. The Defendant replied, "fix it as you please, I shall be satisfied." That the Plaintiff, *Jesse*, then prevailed upon the witness to draw the deed—and that, if he, the witness, had not interfered, the deed would have conveyed a present interest in the slaves to the Plaintiff, instead of reserving a life estate to the Defendant, *Sally*.

Gaston, for the Plaintiffs.

Seawell and *Badger*, for the Defendants.

Hall, Judge.—Without examining into the question which the demurrer presents, viz.: whether the Plaintiffs are volunteers, and how far this Court will aid them by setting aside the division of the slaves, according to the prayer of the bill, the case may, and I think ought, to be decided upon the circumstances which preceded the execution of the deed, and those which were cotemporaneous with it.

His Honor then recapitulated the testimony of the attesting witness, as above stated, and proceeded:

It is to carry into effect a deed of gift thus obtained, that the present bill is filed. It does not appear to me, that the free assent of the grantor was given to the execution of the deed. It was more the offspring of her feelings, than of her understanding. The Plaintiff is at liberty to use it at law, if it will be of any avail to him there. But a Court of Equity cannot grant him any relief, without transcending those limits which for ages it has professed to be governed by.

Per Curiam.—Let the bill be dismissed with costs.

Lewis Ellis
v.
William Ellis, } From Edgecombe.

A bill in the alternative, either for a specific performance of a parol contract, or a re-payment of the purchase-money, is not sustained by Courts of Equity, because if the contract be avoided, the money may be recovered at law.

But upon a bill for a specific performance, which has been refused, where, from peculiar circumstances, the Plaintiff cannot at law recover back his purchase-money, its re-payment is decreed by the Court.

Where a contract is declared to be void, the parties are remitted to their original rights; and where a Court of Equity aids in restoring them to those rights, it confines itself to restitution merely, and never decrees damages for a loss.

Upon a parol contract for the sale of land, the bond of a third person was assigned, in payment of the purchase-money, to the vendor, at the instance of the vendee, by one who was not a party to the contract, the obligor in which was insolvent at the time of the assignment, upon a decree declaring the contract to be void, as the vendee could, at law, recover neither the bond nor the money, the Court lent its aid; but proceeding upon the principle of restitution merely, they ordered a judgment upon the bond in favor of the vendor, to be assigned to the vendee.

After the decree made in this case, at June Term, 1829, (*Ante* p. 343) reversing the decree made for the Plaintiff, at June Term, 1828 (*Ante*, p. 180) the Plaintiff, moved for further directions to the Master, as to the purchase-money paid by him to the Defendant—contending, that although the Court would not decree a specific performance of the contract, yet it would prevent the injury which would result to the Plaintiff from the fact, that he could not recover the purchase-money at law, in an action for money had and received by the Defendant to his use, because that action was barred by the statute of limitations. The facts upon which this motion was founded, will appear by a reference to the case, as already reported, and in the opinion of the Court at this term.

The motion was discussed at length, by *Hogg*, for the Plaintiff, and by *Gaston* and *Badger*, for the Defendant.

For the Plaintiff were cited, *Fingal* v. *Ross* (2 *Eq. Ca. Ab.* 46. *Pl.* 12.)—*Clinan* v. *Cooke* (2 *Sch. & Lef.* 43.)—*Phelps* v. *Thompson* (1 *Johns. Ch. Rep.* 150.)—*Denton* v. *Stewart* (1 *Fonb.* 43, *Note* 2.)—*McReth* v. *Marlar* (1 *Cox*, 258.)—*Gwillum* v. *Stone* (14 *Ves.* 128.)—*Todd* v. *Gee* (17 *Do.* 273.)—*Bebee* v. *Bank of N. York* (1 *Johns. Rep.* 530, 548.)

RUFFIN, Judge.—This cause now comes on, upon a motion of the Plaintiff for further directions; and he claims the assistance of the Court, upon the ground, that as the contract for the purchase of the land, being by parol, cannot be executed, the payments made by him ought to be decreed back. The question of jurisdiction has been much debated at the bar. In general it may be assumed, with certainty, as the rule, that Equity does not entertain a bill in the alternative, upon a parol contract for the sale of land; that is to say, to have a conveyance of the land, or the payment of the money back. Because, as far as concerns the land, the contract is merely void; and the money can be recovered at law, as money had and received. There have been some cases, in which a decree for the re-payment of the money has been made in this Court, upon a bill for specific performance. But they turned on their own circumstances; as in *Phelps*

v. *Thomson*, (1 *John. C. Rep.* 132) where it was clear, that relief at law would be inadequate; and in *Clinan* v. *Cook* (1 *Sch. & Lef.* 43) where there was a particular agreement to return the fifty guineas, if the main contract could not be performed. But it is unnecessary to consider the cases further; because this point in the present case rests on very special grounds also. The Plaintiff might not be able to get at law that very thing, to which alone he has the right. He contends, indeed, that he ought to recover in money the nominal sum, which he gave for the land. But as he gave that in a bond on *Stanton* and *Peel*, he may not be entitled to the money, unless the Defendant has collected it, or failed to collect it by his own fault. If no *laches* could be imputed to the Defendant, the Plaintiff would be limited to the bond only. It may be said, that it could be recovered in *trover*. So it could, if it had been merely delivered over to the Defendant by the Plaintiff. But in the present case, it came to the Defendant by the endorsement of *Horn*, the Plaintiff's guardian, to whom it was payable. The legal title of the bond is therefore in the Defendant, and at law the Plaintiff could not recover it. Indeed, it appears, by one of the exhibits, that the debt was put into suit, in the name of the Defendant, against *Stanton* and *Peel*, and has ripened into judgment. The jurisdiction in this particular case may be sustained on this clear ground, without reference to the doubt at law at the time the bill was filed, and the supervening bar of the statute of limitations, upon which I wish to give no opinion.

The next and important enquiry is, what is the extent of the relief which the Plaintiff can have? The case is, that the Plaintiff being entitled to the sum of about $700 from *Horn*, the guardian of his wife and her brother, agreed to give it to the Defendant for a tract of land.—*Horn* had invested that sum and about $400 more, in the bond of *Stanton* and *Peel*, for $1,100 payable to himself as guardian.

After some treaty about dividing the bond, it was finally agreed, that *Horn* should endorse the whole bond to the Defendant, as the price of the land, and guaranty all above the Plaintiff's own share. This was done; and the Plaintiff gave his bond, with the Defendant as his surety, to *Horn*, for $424 79, the difference between his portion and the amount of *Stanton* and *Peel's* bond. The Plaintiff entered upon the land, and the Defendant brought suit against *Stanton* and *Peel*, and recovered judgment; but has received no money from them, as it turned out that they were insolvent at the time of the contract between these parties. It has been much disputed at the bar, whether this bond was received by the Defendant, in absolute payment for the land, or as a payment if it should be collected. We do not consider it worth our while to determine that, because the decree is upon another reason. We would not, however, help by forced construction to take a man's land away, without his receiving anything for it, when he gave such strong evidence of his determination to have good security, as retaining the title. The evidence on this point is, at best, not clear for the Plaintiff. But admitting that the contract was, as the Plaintiff says, where is the ingredient of equity against the Defendant, to make the bond good? Or what is the Plaintiff's equity to anything more than restoration to that which he parted from? The Court has declared the contract, as such, void. The parties are therefore remitted to their original rights. It is said, that the Plaintiff is entitled to get back what he lost. This was his wife's portion. On the other hand, I think the Defendant is to pay back only what he gained. It is his gain, and not the Plaintiff's loss, which must regulate our decree. If not, this is not a case of restitution, contract, or trust, but of damages. But if the Plaintiff's loss is to be the measure, what part of it is owing to the Defendant. It is admitted all around, that the obligors were bankrupt, while the bond was in *Horn's* hands.

Horn only guarantied the surplus above Plaintiff's portion. He was not bound to do so, if that bond was his ward's property, and he acted *bona fide*.—Then the loss was incurred before the Defendant had anything to do with the paper, and not by his fault. If *Horn* had not acted faithfully, then the Plaintiff has a redress against him yet. The Defendant has none. The plain rule of right is, that the parties should be *in statu quo*. As the Defendant did not receive money from him, nor collect it out of his effects, the Plaintiff can ask only for his bond back. The Defendant must therefore assign to the Plaintiff, without liability, the judgment against *Stanton* and *Peel*.

As for the other dealings between the parties consequent upon the contract, they appear to be these: That the Defendant brought an action of ejectment against the Plaintiff, in which he recovered the land; and then recovered also the sum of $200 for mesne profits, in September, 1827; that he likewise sued *Horn* on his guarantee of the surplus of the bond of *Stanton* and *Peel* over $700, and recovered $638 63, including interest, in September, 1828; that the Plaintiff had found means to get in from *Horn's* executor his bond for $424 79, in which the Defendant was surety; and that he has caused the same to be put in suit, in the name of *Henry Horn*, as executor of *Jacob*. Upon these facts, the plain equity is, that the last-mentioned suit on the bond should be perpetually enjoined; and that after deducting the $200 recovered for mesne profits, with interest thereon, from the said sum of $638 63, the residue of this latter sum be paid into Court by the Defendant for the use of the Plaintiff, and that the Defendant acknowledge satisfaction of his judgment at law against the Plaintiff. As the Defendant offered to transfer to the Plaintiff the judgment against *Stanton* and *Peel*, and also that against *Jacob Horn's* executor, the Plaintiff must pay the costs of this suit, to be taxed by the Clerk; for which execution may be issued, or the same deducted out of any money, which may come into the office for the Plaintiff in this cause.

Per Curiam.—Decree accordingly.

Elijah Scott and Susan his wife
v.
William Duncan,
From Craven.

Where a marriage settlement does not conform to the intention of the parties, either through mistake, or the fraud of one of the parties it will be corrected by a Court of Equity.

Where, however, the correction interferes with the rights of the husband or wife, or issue of the marriage, it will be made with more caution, than where it affects collaterals only, who are strangers to the consideration of the deed.

A marriage settlement, which does not conform to the intention of the wife, will not be annulled, so as to leave the property subject to the legal rights of the husband; but it will be reformed by inserting the omitted provision, upon the same principles on which articles are executed.

Collaterals, who claim under a settlement procured by the fraud of their father, are excluded from any benefit under it, upon its being reformed.

This was a bill filed by the Plaintiffs to reform a settlement, made by them in contemplation of their marriage; whereby the property of the Plaintiff, *Susan*, then *Miss Kornegay*, was conveyed to the Defendant, in trust to permit the Plaintiff to have the use of it during the joint lives of himself and his wife, without being subject to his debts; and from the death of the husband, in case his wife should survive him, then, in trust for her use; and at her death, in trust for the issue of the marriage—and in default of such issue, then to the sisters of the wife, of whom the wife of the Defendant was one.

The case, both upon the bill and answer, and the proofs, is fully stated by his Honor Judge Ruffin.

Gaston, for the Plaintiffs, cited *Osmond* v. *Fitzroy* (3 *P. W.* 131.)—*Cole* v. *Gibson* (1 *Ves. sen.* 503.)—*Huguenin* v. *Basely* (14 *Ves.* 273.)

Badger, *contra*, cited *Griffiths* v. *Wood* (1 *Swanst.* 43.)—*Brooks* v. *Brooks* (*Prec. in Ch.* 24.)—*Lord Irnham* v. *Childs* (1 *Brown's Ch. C.* 92.)

Ruffin, Judge.—This bill is filed to annul or reform a marriage settlement of the wife's estate, executed on the day of marriage, in which the Defendant, *Duncan*, is trustee, upon the ground, that it was obtained by the fraud of the Defendant, or was executed by the Plaintiffs, under a mistake of the wife, relating to a material part of it. The estates are settled to the use of the husband and wife for their joint lives, but not subject to his debts or disposal; and if she survived, to her for life; and upon her death without issue living, over to her two sisters and their children.

The Defendant, *Duncan*, married one of the sisters, and his family thus have the benefit of one half of the estate, in the events just mentioned.

There is no pretence for setting aside the conveyance altogether; for it is clear that a settlement of some sort was deliberately intended by the parties.

On the other hand, it is equally clear, that if the settlement actually made does not conform to the agreement of the parties, by omitting material parts of it, through a mistake all around, or through the fraud of either of the parties to it, Equity will, upon clear proof being made of such fraud or mistake by proper evidence, rectify it.

It is material to observe, that this is not a controversy between the husband and wife, between whom the marriage is a valuable consideration. Between them, or as relates to the issue of the marriage, the provisions of the deed would be more carefully scanned, either by themselves, their friends, or counsel. A bargain is always more regarded than a gift. The difficulty here, is with mere volunteers; who ungraciously say, they have got a donation, and will hold it at all events. They will not hold it, if it has been obtained by surprise, undue influence, and abuse of confidence, by a person trusted to have the deed drawn up, or by the mistake of the parties as to its contents.

A most important circumstance presents itself to our consideration upon first opening this case. The deed is an absolute and irrevocable disposition of the property, although made by a person who was not likely to have issue. That an absolute settlement should be made on the children of the marriage would not surprise us. We should expect that the husband would require it, and not leave it to the wife, without his consent, or that of the trustee, to appoint it away to strangers, or to the issue of another marriage. But here, issue, though mentioned in the deed, could hardly have been anticipated by a lady fifty years of age. In such a case, the want of a power of revocation and re-appointment astonishes. It is against the proneness of the human heart to retain the dominion over property. But if we are surprised at finding no such power reserved to the wife during the coverture, how much more must we be struck, when we come to see, that although the deed contemplates her surviving the husband, yet in that event also her hands are perfectly tied. Her estate does not become her own again, though her necessities may require a sale. She is not even allowed to devise it among her own relations. This deed fixes by irreversible doom the course of the lady's estate, against her own necessary use of it, and power of reasonable disposition, after discoverture: and this, not as against her own children, but as to collaterals, who are strangers to the consideration upon which it was made. It is impossible for a Court of Justice to say, that any extrinsic evidence, any thing out of the deed itself, could entirely remove the suspicion of fraud or of mistake, arising from gross ignorance in the parties, which these strange omissions create. Nothing but imposition, or taking advantage of a fatuous confidence, could bring to the point of actual execution such an instrument. Upon the face of the deed it is fraudulent.

In the case before us, the parol evidence does not weaken, but fortifies the conclusion, to which the deed itself points. The answer indeed denies the fraud. The Defendant says the husband was in debt, and he felt bound to mention it to his sister-in-law; that it was deemed by him and her an act of prudence, to secure the estate from his creditors, and also to protect her from his influence after marriage. That this was perfectly understood by her, and that in consequence of it, she, in the presence of *Scott* and the Defendant, gave the directions for the settlement, as if it was drawn. Admit this; and it yet remains to be accounted for, why she is left in bonds after her husband's death. But passing that by for the present, let us see how the facts are in relation to the wishes and directions of the wife. After they were given, the Defendant admits, that he and *Scott* were to attend Counsel together to communicate them; and that before they left the Defendant's house, *Scott* told him, that he understood them differently. As he understood the lady, a power was to be reserved to her, notwithstanding the coverture, to dispose absolutely of the estates. This would have been an extraordinary power, which the husband would not readily have agreed to, if issue had been expected. But not anticipating that, it would have argued an improper design on the part of the husband, since it would have left the wife too open to his persuasions or his compulsion. The truth is, all the parties seem to be very uninformed people. I have no doubt, that the substance was, that a *proper* power of revocation and appointment was to be inserted, and the parties meant to leave it to Counsel to settle; whose duty in such a case is, obviously, to frame it, as this Court would do, if such a stipulation rested in articles. Upon the objection of *Scott*, reference was again had to the lady; and the Defendant says, she confirmed her former instructions, and *Scott* expressed his satisfaction. The account then given in the answer is, that he and *Scott* went together to *Mr. Stanly* to draw the deed; that there the same difference occurred, when they resorted to the lady for the third time; that she repeated her former words, whereupon, *Mr. Stanly*, in conformity thereto, and with *Scott's* privity, drew the deed, which was read and explained to *Mr. Scott*, who perfectly understood it, and freely executed it. The answer, it is thus seen, unequivocally asserts, that the lady did not wish any power of disposition to remain in herself; but at three different times, and in contradiction to the pertinacious contention of the intended husband to the contrary, gave her instructions to omit such a clause. How does this correspond with other facts given in evidence? It is true, that there was no person present at the time the instructions were given; so that the answer cannot be directly contradicted. But a witness swears, that a few days after the marriage, the Defendant told him, that he had got the property settled on his children and others, so that *Susan* or her husband could not sell it; that a woman was a weak vessel, and could not be trusted; that she signed against her will, but that after hard work, he got things done pretty much as he wished. It appears from other depositions, that this controversy was discussed in the religious society, to which the parties belonged. Their minister and some of their brethren testify, that the Defendant did expressly admit, in the society, that *Miss Kornegay* gave the instructions stated by *Scott* to *Mr. Stanly*; but that he, the Defendant, knew she decided so merely in favor of her lover, and against her own interest; that he was her friend, and felt bound to protect her, and therefore had the settlement drawn in the shape it was, and would not relinquish it. These are subsequent declarations; and although they contradict the answer, point to point, we should not feel safe in decreeing on them alone. But *Mr. Stanly*, who drew the deed, says, that when *Scott* and *Duncan* first applied to him, that both seemed wholly ignorant of the nature of the intended settlement. They did not then disagree as to her wishes, but were without information. He sent them back to consult the lady. They returned, and *Scott* represented, that she wished the estates settled on herself, so that she might dispose of them, notwithstanding her coverture; while *Duncan* insisted, that she desired it to be on her husband and herself for their joint lives, and herself for life, if she survived, with a vested remainder to her relations. This produced an altercation, which induced *Mr. Stanly* to request that the lady herself might attend him, which they declined. Why was he not requested to visit her? Why was the lady debarred from an interview with Counsel? *Mr. Stanly* then suggested different provisions, and made a memorandum of them—which *Scott* and *Duncan* assented to. He then drew the deed, and delivered it to *Duncan*, with instructions to have it read and *explained to the lady*. Is it not clear, from this explicit statement of the intelligent gentleman, who was consulted by these men, that the deed was framed, either *against* the instructions of *Miss Kornegay*, or *without* them? Can there be a material difference, in a case of this sort, which was the fact? But a circumstance occurred at the execution of the paper, which leaves no doubt, that the representation, in the answer, of her wishes, is absolutely false. The Defendant says, that the lady wished not to have the power of disposition. Adhering to the letter of *Mr. Stanly's* instructions, and to that only, he did not request this, or any other legal gentleman, to give the explanation, but procured a neighbour, just before the marriage ceremony, to read it. *Mr. Lente*, who is one of the subscribing witnesses, was the person selected. Now he and the other witness both say, that when he began to read it, *Miss Kornegay* asked, "*whether she could still do as she pleased with her property?*" Can there be the least hesitation after this, that her instructions were for a power of revocation or disposition? But it is then a reliance, that the deed was read over to her: and it is argued, that a mistake of its legal operation could not be averred. It is clear, that where the parties are perfectly aware of the actual contents of a deed; and each acting on his own judgment, or that of his Counsel, omit to insert a clause, for fear it may affect the deed in law, they cannot be helped. But here the question is one of imposition and abuse of confidence. The very enquiry is, whether she did, in fact, know and understand what was in the deed, and what not? It was read to her, it is true. But what a time to produce a complicated marriage settlement to an uninstructed female, dressed for her marriage! Was it read to her, in the hope that she would, or would not understand it? To whom could she apply for advice, but the very person who had contrived the imposition on her? I wonder that she had not signed and sealed without a question. But even at that moment, the strong desire of controlling one's own property showed itself, and prompted the question, "can I still do as I please with my property?"—The answer given by the witness was, "yes, you can; but *Mr. Scott* cannot." This was all she wanted; and in confidence of that, she was willing to execute the deed. It was read through; but can it be supposed that she heard it, or hearing it, comprehended it? The man who was bound, in honor, conscience and law, to advise her, was silent, and fostered the deception.

The evidence then, out of the deed, goes beyond a naked confirmation of the inference from the deed itself of a mistake. It proves actual and deliberate imposition by the Defendant. All his rights therefore, and all the benefits resulting to the sisters and their children from this imposition must yield to the superior equity of this lady to have the settlement reformed. (*Huguenin* v. *Basely* 14 *Ves.* 289.)

But it is argued, that the Court cannot reform this settlement, without inserting a clause which will render the whole deed nugatory; as it will place the wife in the husband's power. This bill is called the husband's bill; because the wife is sunk in him during the coverture, and her wishes cannot be known. The rights of husband and wife are not in conflict in this suit, or touching the matter of it. He derives no benefit under the settlement, and no decree can be had against him. The Court indeed would not set aside a settlement upon such a bill, and let the husband in to his legal rights. As to reforming it, the Court will take care to secure the interest of the wife, so far as consistent with the true spirit of the intended provision, which has been omitted. Here, that was a power of disposition to the wife during coverture. That she is now entitled to. But as we cannot suppose, that it was meant to be of such a general character, as would leave her at the mercy of her husband, it must be so restricted as to protect her. If her real wishes had been laid before the conveyancer, he would certainly have declared a trust for her in fee of the lands, and in absolute property of the chattels, upon her becoming *discovert*: and also, a power of revocation and of appointment by will, or a paper writing, properly attested by two credible witnesses, in the nature of a will, executed during the coverture, in case she died during the lifetime of her husband. This at once reserves to her a reasonable control over her own estates, and secures the free exercise of it, as far as it is now possible to be done, except by super-adding the consent of the trustee. That would be done, if the Court had a faithful one before it. But this trustee has already so far abused his relation to the Plaintiff, and the confidence reposed in him, that no discretion can be allowed to him. The Court decrees therefore, that the marriage settlement be reformed in the particulars mentioned; and that a conveyance be made to such trustees as the Plaintiffs, with the approbation of the Clerk, may select, to be executed by the Plaintiffs and Defendant, and the trustee to be selected, in which trusts to that effect shall be declared; which deed shall refer to the deed in the pleadings mentioned, and to this decree, and be settled and approved by the Clerk of this Court, and acknowledged before a Judge of the Superior Court or of this Court; and that the Defendant pay all the costs of this suit.

Per Curiam.—Decree accordingly.

David Woods
v.
William Hall and
Rankin McKee,
From Orange.

A misrepresentation by the vendor of a fact which materially affects the value of the property sold, and of which the vendee is ignorant avoids the sale.

The employment of a puffer at an auction sale is a fraud upon the bidders and a Court of Equity will direct a bond, given by a bidder for property bought under such circumstances, to be delivered up.

The Plaintiff alleged, that in July, A. D. 1819, being at a tax gathering, a tract of land belonging to the Defendants, as tenants in common, was by them exposed at auction, the Defendant, *Hall*, being the auctioneer—that the land was represented to be fertile, and well adapted to the culture of tobacco—that there was a never failing spring on it, and that it was, in all respects, an eligible situation for a settlement. That being anxious to locate one of his sons for life on land of the kind thus described, he mentioned his views to the Defendant, *Hall*—that the

Plaintiff knew nothing of the land, and became desirous to purchase, solely from the description given of it by *Hall*—that the sale was opened late in the day, at which time, he, the Plaintiff was drunk—that the Defendant, *Hall*, perceiving his situation, after describing the land, as above, cried it at $500—that the Plaintiff asked whose bid that was, and was informed by *Hall*, that one *John Jordan* was the bidder—that the said *Jordan* was present and did not deny it—that believing *Jordan* knew the land, and confiding in his judgment, the Plaintiff was induced thereby to yield implicit confidence to the representations of *Hall*, and thereupon bid one dollar more, when the land was struck down to him—that believing *Jordan* to be an actual bidder, and fully confiding in the description of the land, he executed two bonds for $250 50 each, payable in one and two years, according to the conditions of the sale, and received a covenant for a title. That soon after, he ascertained the land not to be of the quality usually called tobacco land, and that there was no spring upon it, except one which regularly failed in the summer. And further, that several months after the execution of his bonds, he had discovered that *Jordan* was not a real bidder, but had been employed by the Defendants to run up the price of the land which had fallen upon the Plaintiff—that upon all these grounds, the Plaintiff had determined not to pay his bonds, and had notified the Defendants thereof, who had brought an action, and recovered a judgment. The prayer was, that the contract might be vacated, and the Defendants enjoined from suing out execution upon their judgment.

The Defendants, in their answers, denied any intention of defrauding the Plaintiff, or any body else—averred, that the land and spring answered the description given of them; and although they admitted the employment of *Jordan* to bid for them, they urged that being tenants in common, they had determined to sell for the purpose of partition, and that the Defendant, *Hall*, intending to take the land in severalty, unless it went for $500, authorised *Jordan* to bid for him up to that price.

Much testimony was taken, which it is not necessary to state, as all that is important will be found in the opinion of his Honor, Judge Hall.

Badger, for the Plaintiff, cited *Parsley* v. *Freeman* (3 *T. R.* 51.)—*Eyre* v. *Dunsford* (1 *East.* 318.)—*Evans* v *Bicknell* (6 *Ves.* 174.)—*Burrows* v. *Lock* (10 *Ditto*, 470.)—*Clifford* v. *Brooke* (13 *Ditto*, 131.)—*Hill* v. *Buckley* (17 *Ditto*, 395.)—*Cadman* v. *Horner* (18 *Ditto*, 10.)—*Deverell* v. *Ld. Bolton* (*Ditto*, 505.)—*Drewe* v. *Corp.* (9 *Ditto*, 368.)—*Wall* v. *Stubbs* (1 *Mad. R.* 80.)—*Duke of Norfolk* v. *Worthy* (1 *Camp.* 337.)—*Bacon* v. *Bronson* (7 *Johns. Ch. R.* 201.)—*Oldfield* v. *Round* (5 *Ves.* 508.)—*Higginson* v. *Clowes* (15 *Ves.* 523.)

Nash & Winston, for the Defendants, cited *Bramley* v *Alt.* (3 *Ves.* 630.) *Conolly* v. *Parsons* (*Ditto*, 625 *n.*)—*Smith* v. *Clark* (12 *Do.* 477.)—*Calverly* v. *Williams* (1 *Ves. Jr.* 210.)—*Calcraft* v. *Roebuck* (*Do.* 221.—*Grant* v. *Brunt* (*Cowp.* 177.)—*Legge* v. *Crocker* (1 *B. & B.* 515.)—*Twining* v. *Morison* (2 *Bro. C. C.* 326.)

Hall, Judge.—Two principal reasons are urged in this case, against carrying the contract into effect, which the Plaintiff made for the purchase of the land in question. The first is, that the Defendant *Hall* imposed upon him by false representations, as to the land having a good spring upon it. The other is, that he was imposed upon by the same Defendant, in employing puffers at the sale.

It appears, that the tract of land contained one hundred acres; and it is established by nearly all the witnesses whose depositions have been read, that the Defendant *Hall* represented the land as having a never-failing spring upon it. For this purpose the depositions of *John Ray*, *John Hanks*, *William Crosset* and others have been read. It has also been proved by the depositions of *James Ray*, *John Hanks*, *William Crosset*, *John Cummins*, and *Jesse Clark*, that there was not a never-failing spring upon it. *James Ray* says, he went upon the land with the Defendants after the sale, to ascertain whether there was a spring on it; that they found none; that at the place, where it was supposed the spring was, there was not the appearance of any. It appears, from the depositions, that the spring had generally run a part of the year, but dried up in August or September; which, without the aid of a well, would altogether render it unfit for a settlement. This charge of misrepresentation is established beyond doubt, without any conflicting testimony. Whether there was a spring on the land or not, was a circumstance, on which the value of the land, as a settlement, much depended. It was a circumstance, too, with which the Plaintiff might have been unacquainted, although he lived in the neighborhood. The Defendant says, he had been informed there was a good spring on the land. If he had made that representation as from information, the effect upon the Plaintiff might have been different. But there is a marked difference between a representation founded upon belief, or upon the information of others, and a representation that a fact is so.

It appears, further, from the depositions of *Richard Nichols* and *John Jordan*, that each of them was requested by Defendant *Hall*, to bid as far as $500; that he would take such bid off their hands. *Jordan* says, the land was put up at $500, and he heard it cried at that sum. And the Defendant *Hall* admits, that the Plaintiff asked whose bid it was, and was informed by him that it was *Mr. Jordan's* bid; that the Plaintiff afterwards bid one dollar more, and the land was knocked down to him.—This was undoubtedly a fraud upon the purchaser, when it is considered how much men's conduct and acts are influenced by the judgment and opinion of others. And so thought the Defendant, or why did he resort to it? It was thrown out that it was *Jordan's* bid; in other words, that *Jordan* thought the land was worth $500, and had bid that sum for it. I say it was thrown out as a bait, to induce *Woods*, intoxicated as he has been represented to be, to bid a greater sum. But *Jordan* says he had made no bid. Then no bid whatever had been made for the land, until the Plaintiff had bid $501. The representation, then, that *Mr. Jordan* had bid $500, was totally without foundation. With respect to what was said about the quality of the land, the Plaintiff lived in the neighborhood, and ought to have acquainted himself with that. It was a matter of judgment. There can be no ground of relief on that account. In questions of fraud, it might be a circumstance proper to be considered.

The two principal charges in this case, I think, are established: 1st, the misrepresentation, as to the land having a never-failing spring from it: 2d, the charge of employing puffers at the sale. I think the Defendants should be enjoined from further proceedings in the suits, by them brought upon the bonds given for the purchase-money of the land; and that they should pay the costs at law, as well as the costs of this Court.

Per Curiam.—Let the injunction be perpetuated.

Rebecca Bailey et al.
v.
Thomas Shannonhouse, Ex'r. of Thomas Davis, } From Pasquotank.

To a bill against the executors of an executor, by the legatees of the first testator, a plea of the act of 1715 (*Rev. C.* 2) barring claims against dead men's estates unless made within seven years, is not available, without an averment that the residue of the estate had been paid to the Trustees of the University.

The bill was filed in March, 1828, by the legatees of *Benjamin Bailey*, for an account of his estate, and the payment of their legacies.

It averred, that *Benjamin Bailey* died in the year 1811, having made his will, whereof he appointed the testator of the Defendant and another executors—that the testator of the Defendants alone proved the will in March, 1812, and took into his possession all the personal estate, and under a power conferred by the will, sold a valuable plantation, and received the purchase-money—that the executor acted for many years as the guardian of those of the legatees, who were infants—that he died in the year 1817, having made his will, which was proved by the Defendant, whom he appointed executor.

The Defendant pleaded, "that the said *Thomas Davis*, "this Defendant's testator, died more than seven years "before the filing of the Plaintiff's bill, to wit, at, &c., in "the year 1817; nor has the Defendant, at any time since "the death of his testator, promised or agreed to come to "any account with the Plaintiffs, or make any satisfaction, "or pay any money for or on account of his aforesaid tes- "tator, and therefore this Defendant doth plead the act of "Assembly in that case made in the year 1715, for the limi- "tation of actions brought by creditors against any person "deceased, and prays that he may have the benefit of the "same, and pleads the same in bar of so much of the Plain- "tiff's bill as calls for an account of, &c., and prays judg- "ment," &c.

His Honor Judge DANIEL sustained the plea, and dismissed the bill—whereupon, the Plaintiffs appealed.

Hogg, for the Plaintiffs.

Devereux & Kinney, contra, cited *Beckford* v, *Wade*, (17 *Ves.* 86) *Hamilton* v. *Shepperd* (3 *Murp.* 115) *Hollowell* v. *Pope* (2 *Murp.* 108) *McIntyre* v. *Carson* (2 *Hawks* 544) *Cook* v. *Streator* (1 *Dev. Eq. Cases* 324) *Rayner* v. *Pearsall* (3 *Johns. C. R.* 578.)

HALL, Judge.—In the present case, there is no question raised as to the right of property. The Plaintiffs seek that which was their father's, and which by will he bequeathed to them; and in the bill are included the fair claims of the widow, derived from the same source. Whether these claims are barred by the statute of limitations, and given to an executor, it is our province to consider.

By the ninth section of the act of 1715 *Iredell's Rev. c.* 48) any remnant of an intestate's estate, that remained in the hands of an administrator, unexhausted by creditors, and not claimed by the next of kin, is directed, after seven years, to be paid to the churchwardens and vestry, for the use of the parish. By the act of 1784, (*Rev* c. 205) such balance in the hands of an administrator, when his administration shall be finished, and no further demand shall be made by creditors, shall be deposited in the treasury, subject to the claim of creditors and the representatives of the deceased, without limitation of time. Suppose however, that an administrator does not pay over such surplus to the treasury, as he ought to do. As the representatives of the deceased can have no claim against the treasury, it follows, that such administrator will be liable after seven years, because if he had done his duty, the treasury would be liable without limitation of time; and the administrator should not become the owner of the property, as a reward for his delinquency.

By the act of 1809 (*Rev. c.* 763) it is made the right of the trustees of the University to receive, and the duty of executors and administrators to pay to them all sums of money, or other estate of whatever kind, that shall have remained in their hands for seven years after their qualifications respectively, unrecovered by creditors, legatees or next of kin of their testators or intestates. And the trustees are authorized to hold the same absolutely, unless a just claim shall be made for the same within ten years thereafter. If, in the present case, the Defendant had added to his plea, that he had delivered over to the trustees of the University the estate in question, the Plaintiff might have applied for it to the trustees at any time within ten years. But to hold on upon it, against the just and equitable claims of the Plaintiffs, when the executor cannot claim the semblance of a beneficial interest in it, is what the act of 1715 never contemplated.—The decree, therefore, made in this case in the Superior Court, must be reversed.

Per Curiam.—Let the decree be reversed accordingly.

——o——

William S. Blackledge et al
v.
Jordan Nelson et al.
From Pitt.

Upon a bill to foreclose or redeem a mortgage, its existence being admitted, a reference for an account of the amount due upon it is an order of course. Questions respecting that amount properly belong to the account, and are only heard upon exceptions to the report.

This was a bill filed to foreclose a mortgage, which the Defendant, *Nelson*, gave to the Plaintiffs to secure the sum of $3,000—the purchase money of the mortgaged premises. Payment of the purchase money was originally made by an assignment of bonds, which the Defendant guarantied, and the mortgage was given to secure that guarantee.

The decree was resisted upon two grounds.

1. That the title to a part of the land had turned out to be bad, and that the Plaintiffs had, by the agreement for the sale, bound themselves to a general warranty; but in executing the deed, had imposed upon the purchaser by a clause of special warranty only.

2. That the bonds were good when they were passed to the Plaintiffs, and had been lost by the negligence of the mortgagees, or their indulgence to the debtors.

Upon the first point, no evidence was filed by the Defendants. But the Plaintiffs proved, by the deposition of *William Blackledge*, that the deed was in strict conformity to the agreement for a purchase. Upon the second point, evidence was filed by both parties, but at present it is not necessary to state it.

The case was argued by *Hogg*, for the Plaintiffs, and by *Gaston*, for the Defendants.

RUFFIN, Judge.—The Court does not decide the second point in this stage of the case. Upon a bill to redeem or foreclose, when the mortgage is established, unless the parties agree to a decree upon the answer, it is the established law of the Court, that a reference to the Master, to ascertain what is due on the foot of the mortgage, is of course, upon the motion of either party. The Court therefore does not enter upon the question of the solvency of the obligors in the bonds transferred; or of the *laches* of the Plaintiffs. Those matters will come up, when the report comes in. They properly belong to the accounts to be taken; and it might be a surprize to both parties to enter into them now, as they may not have prepared their testimony to those points, expecting to offer it before the Master. The usual reference is therefore ordered.

Per Curiam.—Declare that the conveyance made to the Defendant, *Nelson*, with a covenant of special warranty only, conforms to the agreement of the parties, and decree that the Plaintiffs are barred of relief, by reason of any defect of title in a part of the land conveyed by them to *Nelson*, if such defect exists, and direct an account of what is due the Plaintiffs for principal and interest on the mortgage, including such costs as they have necessarily incurred, in prosecuting suits on the bonds assigned by the Defendant, *Nelson*, to them.

* * *

Thomas Haines
v.
Josiah Cowles and
Ephraim Hough,
From Surry.

One who has conveyed his property, in trust, to secure his own debt, and has assented to a sale of it upon disadvantageous terms, cannot, in Equity, obtain a re-sale of it, although it was purchased by the creditor whose debt was secured.

But other creditors, who have been injured by the sale, will be aided.

The case made by the bill, answers and proofs, was, that the Plaintiff being indebted to the defendant, *Cowles* in the sum of $590, and to other persons to the amount of $400, made a conveyance of all his property to the Defendant, *Hough*, upon trust, to secure the debt due the Defendant, *Cowles*, with a power of sale, in case of a default of payment by the Plaintiff—that after a default, the Defendant, *Hough*, by the directions of *Cowles*, and with the consent of the Plaintiff, sold the property assured in trust, for cash, at a ruinous sacrifice, insomuch, that although amply sufficient to discharge all the debts of the Plaintiff, it was purchased by the Defendant *Cowles*, for a sum less than his debt. And that one

Allison, who was a creditor of the Plaintiff, and attended, the sale, offered, if all the property was sold in one lot, to bid for it the amount of his own debt and that of the Defendant, *Cowles.* The prayer of the bill was, that the property might be re-sold, under the superintendance of the Master, and the Plaintiff declared to be entitled to the surplus, over and above the debt of the Defendant *Cowles.*

Devereux, for the Plaintiff.

Gaston, for the Defendants.

Hall, Judge.—It does not occur to me, that there is any ground on which the Plaintiff can be relieved in this case.

The property, which was sold under the deed of trust, was conveyed to the trustee by him for that purpose. There is no evidence in the case that supports the charge, that the sales of the property were fraudulently conducted, to the Plaintiff's prejudice. It was sold for cash, agreeably to the terms of the deed of trust, to which the Plaintiff had given his assent, and whether it sold for much or little, there can be no remedy for him. If he and *Cowles* had combined to defraud *Haines'* creditors, and on that account the property had been sacrificed, he, being a *particeps criminis*, could have no remedy, although the creditors defrauded would have a fair claim to one.

The Plaintiff probably had it in his power to pursue a course more favorable to both himself and creditors; that is, to have the property sold on a credit. Where a debtor conveys his estate to one creditor by deed of trust, to secure him only, and the property is stipulated to be sold for cash, and not on a credit, in which other creditors are likely to suffer a loss, I think, in such a case, a Court of Equity would lend its aid to prevent such injustice. But this is not that case. No creditor has applied for relief.

If *Allison* had paid off *Cowles'* debt, or tendered it, and it had not been accepted, he might have had a remedy against the property in *Cowles'* deed of trust. But *Allison* only proposed to make a bid for the property to the amount of *Cowles'* and his own debt; and speculated himself into whatever balance might have remained of the property after those debts were satisfied, without any regard to the interest of other creditors. But these remarks are altogether inapplicable to the prayer of the Plaintiff for relief.

Per Curiam.—Let the bill be dismissed with costs.

Isaac Cannon et al.
v.
John Jenkins et al. Adm'rs. of Charles Jenkins & Jesse Rountree, Adm'r. of Wm. Rountree. } From Pitt.

An executor who buys at his own sale, however openly or fairly, holds the property at the election of the legatee, and one who purchases in conjunction with him, is subject to the same rule.

But where an executor at his own sale bid fairly, for the purpose of enhancing the price, and the property being struck off to him, sold it the same day, without collusion, to one who had bid against him, although the executor would have held it subject to an account, yet his purchaser, the sale being a distinct transaction, acquired an absolute title.

Sales of slaves in lots are not favored in Equity, because slaves generally sell better singly; and the person who conducts such sales does it at the peril of answering for the true value. But where the slaves are sold in families, although the executor has no right to consult his feelings at the expense of the legatees, yet he will not be charged the full value, unless the interest of the legatees is manifestly injured by the mode of sale.

Executors are justified by sales at auction in the usual way. But if they depart from this method, and sell at private sale, they are answerable for the full value.

The representatives of an administrator cannot be compelled to account with any person, but an administrator *de bonis non.*

The case of *Ryden* v *Jones*, (1 *Hawks*, 497) approved by Ruffin, Judge.

The Plaintiffs, who were the legatees of *Willie Cannon*, alleged, that the said *Cannon* died, having published his will, which was proved by the intestate *Charles Jenkins*, to whom letters of administration with the will annexed, issued, the executor therein appointed having renounced: That directly after the issuing of the letters of administration, the administrator, under the pretence of executing the will, but with an intention of fraudulently making a profit to himself, advertised four young negroes, viz: *Jacob*, *Phil*, *Tom*, and *Sam*, who were directed by the will to be sold upon a credit of ten days: that in pursuance of this fraudulent intent, and to prevent the said slaves from bringing their value, they were sold in one lot, and were bid off by the administrator himself, at the price of $1,025—that *Willim Rountree*, the intestate of the Defendant, *Jesse*, was present at the sale of the slaves, and immediately thereafter took the whole of them into his possession. The Plaintiffs averred, that the whole of this transaction was a pretence, to cover the profit made by the administrator upon a private sale of the negroes by him to *Rountree;* and they prayed that the sale might be declared to be void, and the Defendant, *Jesse*, decreed to be a trustee of the slaves for their benefit, and that the administrators of *Charles Jenkins* might account with them for their intestate's administration of *Willie Cannon's* estate.

The answers denied altogether the agreement between *Jenkins* and *Rountree*, as charged. The Defendants admitted, that the four negroes were offered together at public sale; but they stated the reason to have been, that they were four *brothers*, whereof the eldest was not more than eight, and the two youngest twins, about four years of age. They also admitted, that at the public sale, *Jenkins* became a bidder, and the last bidder at $1,025. But they stated, that he bid only for the benefit of the estate, and to run up the property; that he did not intend to make, nor did he make any advantage to himself by the purchase: that the bidding was not collusively for the benefit of *Rountree*, for that *Jenkins* and *Rountree* were bidders against each other: that the credit of that sale was six months, and not ten days: that it was fairly conducted—*Jenkins*' bids openly given, and dwelt upon by his directions, and that he urged persons to bid upon himself: and finally, the price at which the negroes were knocked down to *Jenkins*, was a fair and full one: and that after *Jenkins* was declared the purchaser, and on the same evening, he sold the negroes at the same price to *Rountree*, who immediately gave his bond, received the negroes, and held the exclusive possession, for his sole use, up to his death, nearly thirteen years afterwards.

The administrators of *Charles Jenkins* denied that anything was due from their intestate to the Plaintiffs, but submitted to an account. Upon replication, proofs were taken,the substance of which is stated in the opinion of his Honor Judge RUFFIN.

Gaston, for the Plaintiff.

Hogg & Mordecai, for the Defendants.

RUFFIN, Judge.—The bill is framed upon the rule in *Ryden* v. *Jones* (1 *Hawks* 497) and moreover charges an actual fraud in the purchase by *Jenkins* at under value, by means of a sale of all the negroes in a lump, on ten days credit. The doctrine of that and similar cases is recognized throughout. An executor buys at his own risk; and no matter how openly, nor for how full price, he holds purely at the election of the legatee. Nor could this case be distinguished from those, by the introduction of *Rountree*, as a third person, provided he purchased in conjunction with the administrator. He who knowingly connects himself with a trustee in a breach of trust (and he must do it knowingly, if he purchase from him on joint account)must abide the fate of his faithless companion, whatever form the transaction may assume.

His Honor, after stating the substance of the answer, as above, proceeded: Without scanning the depositions minutely, it is sufficient to say, that the answers are fully sustained by the proofs. And the witnesses disclose another fact not mentioned in the answers, which strongly rebuts the charge of collusion; which is, that *Jenkins's* last bid was $25 upon that of *Rountree* of $1,000. Every person present, members of the family as well as strangers, thought the whole business fairly conducted; and in particular, a lady, who is taken to be the widow of the testator, urged *Rountree* to purchase, as he already owned the mother of the boys.—From this state of the facts, it is manifest, that the case is not within the principal upon which the bill goes. If indeed the case of the Defendant, *Rountree*, rested upon the purchase by *Jenkins*, it would necessarily give way; for as affecting the title to the slaves, that is a mere nullity. Such indeed seems to have been as much the actual intent of *Jenkins*, as it is the conclusion of law. He did not design a purchase for his own benefit. He did not for a moment claim an individual interest. But being desirous of obtaining the best price, he run the property up against *Rountree*, until it finally fell on himself; and finding that he was unable to screw *Rountree* higher, he afterwards sold to him for the same price. *Rountree's* purchase was therefore a separate and distinct transaction; of which the validity is not dependent upon the previous purchase of *Jenkins*, but upon the general authority of the latter, as administrator, and the actual *bona fides* of the parties in this last and only real sale.—And there seems to be nothing in the conduct of the purchaser, that can taint his title. It is to be expected, that he will buy as low as he can; and he is not to advise in what lots the property is to be offered, nor be responsible for an injudicious arrangement. If indeed the smallness of the price, the insolvency of the executor, or in a word, the whole face of the proceeding, showed a collusion between the vendor and vendee, Equity would reach the property. But there is no pretence for that here; for an inadequate price essentially enters into that proposition; and all the witnesses prove, that the sum of $1,025 was the full value of the negroes, as they were purchased by *Rountree*, namely, *in one lot*. Nor could the price have altered *Rountree's* right, notwithstanding the sale in a lump, had he purchased at a public sale, otherwise fairly conducted.—The bill must therefore be dismissed as against the administrator of *Rountree*, with costs.

A sale in the lump may be attended with very different consequences to the administrator himself. The Court does not favor sales by executors in large masses. Most commonly the articles sell best, singly; and therefore they ought, in general, to be so offered. It is not exactly like sales by Sheriff, which ought to be most strictly watched; for as only so much as will satisfy the execution ought to be sold, so only so much as will probably satisfy it, ought to be set up. In sales by executors, the whole is to be sold at all events, by the terms of the will. And it is the duty of the executor to get the most he can. Sometimes, indeed, as much, or more can be had, when the property is disposed of in one, than in more parcels, as in the instance of a *family* of slaves, when the children are *all* of tender years. But he, who conducts such a sale, does it at his peril, and must answer for the true value, where the price has been materially affected by the mode of sale. It would certainly have been harsh to separate these four boys, and sever ties which bind even slaves together. True, it must be done, if the executor discovers that the interest of the estate requires it; for he is not to indulge his charities at the expense of others. But the Court would not punish him for acting on the common sympathies of our nature, unless in so doing he hath plainly injured those, with whose interests he stands charged.

This doctrine however does not directly apply to the case before us; for it can only embrace sales regularly made by auction, according to the common course. If the executor sell in that way, the price actually obtained is his justification, unless it has been diminished by his mismanagement or fraud. But if he take upon himself to depart from his plain line of duty by selling by private contract, he makes himself responsible for the true value, without reference to the price obtained, unless perhaps in very extreme cases of necessity. In such case, he can derive no help from the fact, that he disposed of each single article by itself; nor suffer detriment from selling the whole together. In each case, he puts himself upon the single point, that as much, or more, has been got in that way, than could have been got by auction. In this respect only, is the purchase of *Jenkins* at his public sale material in this case. Under the circumstances proved, it is deemed a fair criterion of the highest price. Besides that, all the witnesses think it a fair one, and some of them that it is higher than the real value, and that nobody but *Rountree*, who owned the rest of the family, would have given as much, if the negroes had been severally sold. Indeed, it speaks for itself, being $256 25 each, for little children. The Court, therefore, cannot but approve of the conduct of the administrator before us.

There is a prayer, in case the Plaintiffs cannot recover the slaves themselves, for an account of the *proceeds*. This involves a general account of *Jenkins'* administration—an account, to which the next of kin have no primary right, but only the administrator *de bonis non* of the testator; and he is not made a party. In strictness, as the cause has been brought to a hearing without him, the bill might be dismissed; and perhaps it ought, as no application was made for an account before filing the bill, and the main scope of it touches the title to the slaves, and is wholly groundless. But as *Jenkins'* administrators submit in their answer, to an account with the Plaintiff for their shares, without making objection to the want of parties, the Court will permit the cause to stand over, as to the administrators and next of kin of *Charles Jenkins*, a reasonable time for amendment. But in the meanwhile, these Defendants are entitled to their costs up to this time.

Per Curiam.—Declare that *Charles Jenkins* did not purchase, and did not intend to purchase, at the public sale made by him, the slaves in the pleadings mentioned, for his own use, or that of *William Rountree ;* but that he bid, merely to run up the price for the benefit of the estate of *Willie Cannon ;* and declare further, the said purchase by *Jenkins* to be merely void. Declare further, that on the day of public sale, and after it, *William Rountree* purchased from said *Charles*, as administrator, for a valuable consideration, and without collusion, by a new agreement distinct from the purchase aforesaid of said *Charles*—and decree, that the bill be now dismissed, as against the Defendant, *Jesse Rountree*, with costs.

Declare further, that the said *Charles* is liable to the estate of his testator for the actual value of said slaves, because he did not sell them at auction ; but that the said price obtained from the said *Rountree*, was a fair and full one, and therefore the Court doth, under the circumstances, approve of the sale to the said *William*, at that price.—And because the Plaintiffs cannot proceed to the taking of an account of the estate of the testator, which came to the hands of said *Charles*, without having the administrator *de bonis non* before the Court, let the cause be retained, as against the other Defendants, with liberty to the Plaintiffs to add parties, &c.

Reuben Moore
v.
Jeremiah Hylton and Henry Chamblis, } From Stokes.

Wherever the debtor, by the terms of the contract, can avoid the payment of a larger, by the payment of a smaller sum at an earlier day, the contract is not usurious.

In such case, the larger sum becomes a penalty, against which Equity will relieve.

To constitute usury, the obligation to pay more than legal interest must be absolute upon the face of it.

Where the holder of a bond for the payment of a certain sum, promises to surrender the bond upon the payment of a sum at an earlier day, to less take advantage of such promise, there must be a strict compliance on the part of the obligor.

An injunction is not dissolved of course upon the coming in of the answer, in which the Plaintiff's whole case is denied. The statement of the Defendant must be at least credible. Any evasion in not responding to the material charges in the bill, or an extreme improbability in the statement of the Defendant, will induce the Court to retain the injunction.

The Plaintiff alleged, that in the month of January, 1820, he purchased of one *Levi Loyd*, the agent of the Defendant, *Chamblis*, a stallion—that *Loyd* gave a certificate of the pedigree of the horse, and also of his age, which was stated to be eight years—that the price given was $400, for which the Plaintiff executed his bond, which was delivered by *Loyd* to *Chamblis*—that soon after the Plaintiff discovered that he had been grossly deceived in the age of the horse, and notified *Chamblis* that he would not pay the bond given upon the purchase—that after receiving this notice, *Chamblis*, accompanied by the Defendant, *Hylton*, came to the house of the Plaintiff, where *Chamblis* admitted the horse to be much older than had been represented to the Plaintiff, and expressed his surprise that *Loyd* should have made such a statement—that it was then agreed between the Plaintiff and *Chamblis*, in consequence of this misrepresentation, that $100 should be deducted from the Plaintiff's bond, and that the Plaintiff should pay the residue in a short time—that the Plaintiff then applied to the Defendant, *Hylton*, to lend him $300 to pay off the balance of the bond, who agreed to advance it, if the Plaintiff would come to his house the next day—that when the parties met, *Hylton* insisted upon having the Plaintiff's bond assigned to him, which being done, he paid to *Chamblis* $300, and agreed that the Plaintiff should have the benefit of the deduction stipulated for by *Chamblis*, and then executed the following memorandum: "I oblige myself to deliver to *Reuben Moore* his bond of "$400 given to *Levi Loyd*, on the payment of $300 by the "20th of June, 1820." The bill then charged, that *Hylton* had commenced an action in his own name upon the Plaintiff's bond, had recovered judgment, and was pressing an execution for the whole amount of it—the prayer was for an injunction, as to $100 of the debt.

The Defendant, *Chamblis*, in his answer, admitted the sale of the horse, through the agency of *Loyd*, as charged in the bill, that the bond was made payable on the 25th of December, 1820, and was by *Loyd* left with the Defendant, *Hylton*, for collection—that in May following the sale to the Plaintiff, he, the Defendant, went from his residence in Virginia to the house of the Defendant, *Hylton*, in Stokes County, when both of them went to the house of the Plaintiff—that he, *Chamblis*, being then in want of money, on the way offered to sell the Plaintiff's bond to *Hylton*, but that no bargain was then made—that after their arrival at the house of the Plaintiff, he, *Chamblis*, and the Plaintiff had some private conversation, in which the Plaintiff complained that the horse was more than eight years old—that he, the Defendant, stated the age of the horse to be twelve years, and that *Loyd* was not authorised to represent the horse to be only eight—that the Plaintiff insisted upon having some deduction from the bond, on account of the misrepresentation of *Loyd*, which was refused by him—but that he then informed the Plaintiff, as the bond had a considerable time to run, and he, the Defendant, was much in want of money, he would take for the bond $300, provided it was promptly paid—that the Plaintiff then agreed, if he could borrow the money, he would, either that evening or the next morning, pay $300 and take up his bond—that he believed the Defendant, *Hylton*, had the money, and he would endeavor to borrow it of him—that the Plaintiff applied to *Hylton* to lend him the money, but the Defendant did not know what passed between them, further than that it was then agreed, that the parties should all meet the next day at *Hylton's* house, when he, *Hylton*, refused to lend the Plaintiff any money, but bought his, the Plaintiff's, bond of him, *Chamblis*, for $300, promising that if the Plaintiff would repay him on the 20th of June following, he, *Hylton*, would deliver up the bond, and that *Hylton* gave the Plaintiff an instrument in writing to that effect, stating at the same time, that if the Plaintiff did not thus repay him, he should exact the amount of the bond—to which the Plaintiff assented, and promised either to pay the $300 by the time limited, or to pay the amount of the bond at its maturity.

The Defendant denied all knowledge of the certificate given by *Loyd* to the Plaintiff, respecting the age and pedigree of the horse, and denied that *Loyd* was authorised to represent the horse as of the age of eight years.

The Defendant *Hylton*, in his answer, admitted the sale of the horse to the Plaintiff by *Loyd*, and that the bond was left with him for collection—he stated, that up to the month of May after the sale, he never had seen the Plaintiff—that in that month *Chamblis* came to his house, endeavoring to raise money, saying that an execution was then out against his property, which would be sold unless he could raise $300, and proposed, that he, *Hylton*, should lend him that amount—that he, *Hylton*, proposed going to the house of the Plaintiff, from whom the money might probably be obtained—that while they were at the Plaintiff's house, *Chamblis* and the Plaintiff had much conversation, which he did not overhear—that after it was over, the Plaintiff informed him, *Hylton*, that if he had $300 he could take in his bond of $400, and requested, him, *Hylton*, to lend him that sum, which was refused, the Defendant stating, that if he loaned money to either of them, it must be to *Chamblis*, with whom he was acquainted—that upon the repeated importunity of the Plaintiff, he agreed to meet at his, *Hylton's*, house, the next day—that upon their meeting, he still refused to lend the Plaintiff any money, as he was utterly ignorant of his circumstances—the Plaintiff then insisted upon his purchasing the bond of *Chamblis*, stating most positively, that he would repay him in ten days—upon which the Defendant did advance the money to *Chamblis*, took an assignment of the bond, and executed to the Plaintiff the instrument already set forth—he denied positively, that any deduction from the bond, on account of a fraud in the sale of the horse by *Loyd*, was mentioned to him, or that he knew of any complaint on that account before his purchase, and averred, that in several conversations between him and the Plaintiff, before and after the expiration of the twenty days limited for the re-payment of the money lent, the Plaintiff never, in any form, objected to the bond, on account of any fraud in obtaining it, but constantly stated his willingness to pay the $400, unless he made the payment of $300 by the time limited in the instrument, given him by the Defendant.

Upon these answers, the injunction was retained until the hearing, and replications were filed. No testimony was, however, taken; and after the cause had stood in the Court below on this order, for several terms, it was set for hearing, upon the bill and answers, and removed to this Court.

Nash, for the Plaintiff.

No Counsel appeared for the Defendants.

Ruffin, Judge.—The point, upon which the Plaintiff's counsel has put this case, does not arise. There is no usury, even if it be taken for granted, that the advance of the $300, was by way of loan from *Hylton* to *Moore*. For wherever the debtor, by the terms of the contract, can avoid the payment of a larger by the payment of a smaller sum at an earlier day, the contract is not usurious, but conditional; and the larger sum becomes a mere penalty. To constitute usury, the obligation to pay more than the legal rate of interest must be absolute upon the face of the transaction. Now, regarding the assignment of the bond, and the instrument in the nature of a defeazance, given by *Hylton* to *Moore*, all as one transaction—as we must do, when we treat the advance of the money as a loan, and these papers as securities—they show the true debt to be $300, to be paid on the 20th of June under penalty of $400. If this were usury, every penal bond would be void. Nor is there usury as between *Moore* and *Hylton*, upon the score of the discount allowed by *Chamblis;* that is, taking the transaction to be a sale of the bond by *Chamblis*. For a contract good in its creation is not avoided by a subsequent usurious agreement. The receipt of the unlawful interest subjects the receiver to the penalty; but the validity of the security is not impaired thereby.

But the Plaintiff is as clearly entitled to be relieved from the $100, regarding it as a penalty, as he would be on the score of usury, did that exist. If there was a loan by *Hylton* to *Moore*, only the money advanced and interest can be now exacted, whatever the form of the securities may be. The excess beyond that would be either usurious interest or a penalty; in either case the Court would relieve.

It does not appear distinctly from the framing of the bill, whether the relief is put upon that ground or upon that of the fraud in the sale of the horse, and the subsequent compromise between *Moore* and *Chamblis*. It is manifest, that those two cases can have no connection with each other, so as to create an equity for the Plaintiff. For it is immaterial what was the character of the dealings between *Moore* and *Chamblis*, if in fact the money was lent by *Hylton* to *Moore;* for that is a new and independent contract. It is to be regretted, that pleaders do not place the equity of their clients upon distinct statements, calculated of themselves to support it, so that the ground of the relief might stand out visibly to the Court. Looseness and confusion in stating the Plaintiff's case often embarrass the Court, and defeat the relief by not drawing from the Defendant distinct and proper answers. But it is unnecessary to pursue these considerations further, since the cause must be decided against the Plaintiff upon other points.

For allowing the bill to be duly framed, and to stand in the alternative, that there was a loan to *Moore* directly, and that the assignment of the bond was merely a mode of securing the re-payment; or that *Loyd* was guilty of a deceit in the sale of the horse, and that *Chamblis* agreed to deduct $100, as the valued damages on that account, and that *Hylton* purchased the bond afterwards, with notice thereof; in either aspect, the bill must be dismissed, not for want of equity, but for want of evidence. The Plaintiff's equity upon the first point has already been considered. That on the second head is equally clear, taking the facts for granted. That they are true is most probable. For it is almost impossible to suppose, that *Loyd* should be sent off by *Chamblis* to make sale of a covering horse, without any instructions to the material fact of his age; that *Chamblis* should have felt it necessary to hold his conversations with *Moore*, upon the simple matter of a speedier payment of the bond, in private; that *Moore's* complaint of the fraud should not have entered at all into the agreement for the deduction; that *Chamblis* should have entirely concealed from his particular friend *Hylton*, then his companion at *Moore's*, and his host that night, those parts of the conversation, which concerned *Moore's* grievance; and that the agreement given in writing by *Hylton*, to receive $300, had no reference to the defect in the horse, and *Chamblis'* stipulation to abate for it. Yet such is the tale in the answers; which deny altogether and directly the fact of the loan; deny the fraud by *Loyd*; do not admit his certificate; admit *Chamblis'* agreement to deduct $100, but attribute it altogether to his pressure for money, which induced him to allow that heavy discount for prompt payment; admit the written instrument, charged to have been given by *Hylton*; but say, that it was a mere bounty, for that he refused to lend the money to *Moore*, but bought the bond from *Chamblis*. It would be hard to believe witnesses who deposed to such a case, much more the answers of Defendants. The Court did therefore very right to refuse to dissolve the injunction upon the coming in of the answers. Upon that occasion, the answers could be scanned; and although their contents are generally to be deemed true, yet any evasion in not responding to the material charges of the bill, or an extreme mprobability in the accounts given by the Defendants of the transaction, might well prevent the Court acting on them. Upon a motion to dissolve, the Defendant is the actor. His statement must not therefore shock credulity itself. In such a case, the Court will keep up the injunction, to allow the Plaintiff an opportunity to except to the answer; or let the case stand for proofs. For upon a replication to the answer, the Defendant must prove the whole of his case, and his answer is only evidence of it, so far as it is responsive to the Plaintiff's charges.

Here no proofs have been taken on either side; and the Plaintiff has overruled his own replication, by setting the cause down for hearing *upon bill and answers*. What before we could not listen to, now becomes quite credible, because the Plaintiff expressly admits the truth of it upon the record. The answers deny positively the loan; do not admit the fraud, and deny any agreement to abate therefor; and assert a sale of the bond by *Chamblis* to *Hyltcn.* Upon the answers, which the Plaintiff compels us to receive as true in *all* their parts, the case is this: a creditor agrees, without any consideration, and purely as a bounty, to remit to his debtor a portion of his debt. Such a promise is obligatory, neither at Law nor in Equity.

HENDERSON, Chief-Justice, concurred.

HALL, Judge, *dissentiente.*—From the answer of *Chamblis,* it is more than probable, that a fraud was practised upon *Moore* by *Loyd,* as to the age of the horse he sold him, as the agent of *Chamblis.* And I collect it from that part of *Chamblis'* answer, which says, that he had not authorised *Loyd* to state that the horse was eight years old, *nor did he know whether Loyd knew the age of the horse cr not.* The extraordinary feature of this transaction is, that he should entrust an agent with the sale of the horse, who was ignorant of his age. But the enquiry need not be pursued, as this answer is not evidence against *Hylton.*

Hylton admits, in his answer, that the purchase of the horse was the consideration of the bond, which *Loyd* lodged with him for collection: that *Chamblis* afterwards came to his house, and wished to borrow three hundred dollars from him, though he does not state that he offered him the bond for that sum. Had he purchased it at that time, for that sum, and without any knowledge of any fraud committed by *Loyd,* the bond then not being due, the Plaintiff would have been compelled to discharge it. It appears from *Hylton's* answer, that they went to the house of the Plaintiff the next day; and whether on that day *Hylton* became the creditor of the Plaintiff, by contract, made on that day and afterwards at *Hylton's* house, or whether he became such merely by purchase of the bond from *Chamblis,* and taking an assignment of it, is the important question between the parties. *Chamblis* denies, in his answer, that he made any deduction from the amount of the bond, on account of any fraud charged to have been committed by *Loyd;* and *Hylton* denies, that he knew that any charge of fraud was alleged against him. Under these circumstances, it is a little strange, that *Hylton* did not purchase the bond before they went to the house of the Plaintiff. However, it appears, that when at the House of the Plaintiff, he, the Plaintiff, wished to borrow of *Hylton* $300, saying, he could take in his bond for that sum, *Hylton* declined, saying, he was unacquainted with his circumstances, and that if he loaned it at all, it must be to *Chamblis*, with whom he was acquainted. However, he says upon repeated applications of the Plaintiff, he requested him to come to his house the next day, when they would consider further of the proposition; that upon this meeting at his house the next day, he still declined loaning the money to the Plaintiff, because his circumstances were unknown to him; that the Plaintiff then insisted upon his purchasing the bond of *Chamblis*, and that if he would do so, he would return the $300 in ten days. He, the Defendant *Hylton*, states, that relying upon the Plaintiff's representation, and depending upon his punctuality, he did purchase the bond of Chamblis, and took an assignment of it. He also admits, that he entered into a written contract with the Plaintiff, by which, he obliged himself to deliver to the Plaintiff his bond of $400, on the payment of $300 by the 20th of June, 1820. I think, certainly, that *Hylton* could have purchased the bond from *Chamblis* for $300, without having anything to do with the Plaintiff. And it may be asked, why did he not do this, rather than make a worse bargain with the Plaintiff? I can answer no otherwise, than by supposing that *Hylton* thought he would make a safe contract, by getting Plaintiff's acknowledgment of the goodness of the bond; and that he would still get the full amount of it, as the Plaintiff would not return the $300 by the time stipulated; and if he did, he would then receive no injury, because in that case, he would receive his principal and interest. Another strong reason, why he wished the assignment of the bond as security for his debt, was, that *William Moore* was a surety to the bond. It is very remarkable, that from the time that *Hylton* and *Chamblis* went to the house of the Plaintiff, until the $300 advanced at the house of *Hylton*, there was no contract made, or negotiation carried on between *Hylton* and *Chamblis*. The assignment of the bond was in consequence of the bargain made by Plaintiff and *Hylton*.

It may now be asked, what was the contract of the Plaintiff and *Hylton*, after the assignment of the bond to the latter. The contract was, that the former borrowed of the latter $300, and by his consent, and at his request, took as a security for it the Plaintiff's bond for $400. As that was the sum borrowed, that sum with interest ought to be paid, and an injunction ordered as to the $400.

It is said, that the Plaintiff should pay $400, because the Defendant denies all fraud, and his answer is to be taken as true. My reply is, that the bond had several months to run before it came due. *Chamblis* was anxious to raise money, because an execution was pressing him at home. This he stated to *Hylton*, as he admits. He, *Chamblis*, offered to take $300 for the bond. This caused the Plaintiff to be solicitous to borrow the money from *Hylton*. I think he did borrow it, and therewith purchased the bond, which *Hylton* took as his security for his debt of $300. It is true, Plaintiff told *Hylton*, if he did not return the money in so many days, he would pay (or forfeit as I say), the amount of the bond. But this, as between the Plaintiff and *Hylton*, was a penalty, which the latter thought would be his gain. But being a penalty, the law will not permit him to recover it. He ought to be contented with the money loaned, and interest upon it. The $400 was given up by

Chamblis, for an advance of $300, which Plaintiff borrowed of *Hylton*, and paid him in advance, before the bond became due, to relieve him from his then embarrassed situation. The gain of $100 was the Plaintiff's. I think there is enough to be collected from *Hylton's* answer to come to that conclusion. Could we look into the whole transaction as it took place, it is more than likely it would be seen, that it was just that it should be so.

PER CURIAM.—Let the bill be dismissed with costs.

William Keaton & Elizabeth
his wife
v.
Enoch Cobb & Mary his wife, } From Wayne.

A fraudulent trustee, who, pending a litigation between him and his *cestui que trust*, purchases the trust estate at a Sheriff's sale, acquires thereby no title, and the Sheriff's deed to him can stand only as a security for the amount of his bid.

Where the *cestui que trust* incurs costs at law, in defending a title purely equitable, against his trustee, and does not at once come into the proper forum for redress, he cannot in Equity recover his own costs at law; but he is entitled to a re-payment of the amount of costs paid to the trustee.

The allegations of the bill were, that in the year 1816, the Plaintiff, *Elizabeth*, and the Defendant, *Mary*, being sisters, and unmarried, purchased jointly, a lot of ground in the town of Waynesborough, and contributed equally to the payment of the purchase-money—that on account of the nonage of the Plaintiff, *Elizabeth*, the deed for the lot was made to the Defendant, *Mary*, who was of full age—that at the time of the purchase, the lot was unimproved, and the sisters being desirous of procuring a home for themselves, as well as for their parents, who were old and infirm, agreed with their father, *John Sasser*, that if he would assist in building a dwelling-house, and otherwise improving the lot, he and his wife might live in it during their lives—that accordingly, the sisters procured at their joint expense the necessary materials, and a house and out-houses were erected by them, with the assistance of their father; that their father occupied the premises until his death; after which, their mother and themselves lived together in great harmony, until the marriage of the Defendant, *Mary*, with the Defendant, *Cobb ;* that as soon as the Plaintiff, *Elizabeth*, heard of the treaty for that marriage, fearing some difficulty with the intended husband, she applied to her sister to execute a deed to her for her undivided moiety—that her sister then acknowledged the right of the Plaintiff, *Elizabeth*, in the fullest manner, and stated to her, that the husband of the Defendant could not deprive her of possession of the lot, and that with this assurance, the Plaintiff being perfectly satisfied, no deed was executed by the Defendant, *Mary*—that soon after the intermarriage between the Defendants, the Defendant, *Cobb*, pretending to be ignorant of the agreement between his wife and the Plaintiff, *Elizabeth*, and between them and their parents, commenced an action of ejectment; and after the Plaintiffs had made every defence in their power, succeeded in obtaining a verdict and judgment, and was proceeding to execute a writ of possession. The death of the mother, and the intermarriage of the Plaintiffs, pending the ejectment, were then averred. An injunction, and a decree for the re-payment of the costs at law, were prayed.

The Defendants denied every allegation in the bill, and as a distinct defence, the Defendant, *Cobb*, averred, that since the controversy respecting the lot had arisen, he had, at a Sheriff's sale, purchased whatever title the Plaintiff, *Keaton*, had thereto, for $8 50, under a judgment and execution against him.

Upon the coming in of the answers, the injunction which had been granted on the filing of the bill, was dissolved, and the Defendant, *Cobb*, put in possession.

Many depositions were read at the hearing, by which every allegation of the Plaintiffs was fully supported.

Badger and *Mordecai*, for the Plaintiffs.

W. H. Haywood, for the Defendants.

Ruffin, Judge.—The agreement charged in the bill, for the joint purchase of the lot in dispute by the two sisters, and the payment of the purchase-money and of the cost of putting the buildings on it by them equally, though denied in the answer, are facts proved beyond a doubt by the depositions. A conveyance to the Plaintiffs of one half must therefore be decreed.

It is, however, stated, in the answer, that *Cobb* has purchased at Sheriff's sale the estate of *Keaton*, the husband; and it is insisted, that precludes the Plaintiff from any relief. At most, that purchase would extend only to the life estate of the husband, and would not affect the fee of the wife. But even that effect cannot be allowed to it. Here is a trustee, who denies the right of his *cestui que trust*, and brings an ejectment to evict him; and during the litigation and doubt cast on the title by the trustee himself, purchases under execution at a price enormously inadequate. To allow him to hold under such a title would be to encourage iniquity. The Sheriff's deed can only stand as a security for what the Defendant advanced upon the execution.

It does not appear, whether the costs of the suit at law have been paid. It is to be presumed they have, as the injunction at first granted, was dissolved upon the coming in of the answer. The Plaintiffs now ask for an account of those costs, and to have refunded what they have paid to the Plaintiffs at Law, and to recover their own costs at

Law. Certainly they must get back the costs of the ejectment, paid to the Plaintiffs in it. Nothing can be plainer, than that *Cobb* and wife ought not to have used their legal title in that way, and they must be content to do it at their own expense ; for the Plaintiffs never denied their title to a moiety. In this particular case, the gross oppression, attempted by the Defendants, prompts us to go as far as we can to make them pay all the costs, wherever any can be found. But we cannot yield to our feelings against principle. The title of the Plaintiffs was not legal, though a clear one in this court. If a party in that situation chooses to contend at law, without resorting at once to the forum, in which alone he can properly be redressed, he must not expect to recover his costs, unless he succeeds at law. He chooses his game, and must put up with his luck If it was wrong in the Defendant to bring ejectment, he must bear the burden of the costs incurred by him. And it being equally wrong in the Plaintiff to rely upon a bad title, in a Court which could not investigate and sustain his real rights, he must likewise be out of pocket the money he has spent in that fruitless defence.

It is much to be regretted, that ignorant and poor people should be advised to such long, expensive and fruitless litigation ; for I dare say, they knew no better. But we cannot help them, without holding out an encouragement to others to keep at law for the sake of it, instead of putting their cases at once upon the merits.

As to the rents and profits, it is to be remarked that by the contract, charged in the bill and proved by the witnesses, between *John Sasser*, the father, and his two daughters, the father and mother were to enjoy and occupy the premises during their lives as a home. This was in consideration of his erecting the houses ; which he did. It is not a question now, how this might be treated by the father's creditors. But as between the parties, there can be no rent during the occupation by either of the parents. From that period, however, each sister is liable for rent received by her, or for a reasonable rent during their own exclusive occupation respectively; as to which an account must also be taken.

Per Curiam.—Declare that the agreement between the Plaintiff, *Elizabeth*, and the Defendant, *Mary*, for the joint purchase of the lot in dispute, and for the erection of houses on it at their joint expense, as charged in the bill, is fully proved. Declare further, that said *Elizabeth* paid one-half of the purchase-money for said lot, and of the expenses of erecting buildings on it, and that she is entitled to one undivided half of the said lot: And decree, that the Defendants convey to the Plaintiff, *Elizabeth*, one undivided moiety of the said lot, with the appurtenances, in fee-simple. And let it be referred to the Clerk, to take an account of such monies as may have been paid by the Plaintiffs to the Defendants, as the costs of the suit at law, and let him state any balance due thereon; and order, that the Defendants desist from proceeding on their execution for such balance, if any there be; and order the Plaintiffs to be entitled to recover back any such costs as the Defendants may have received, as aforesaid: And let it be referred to the Clerk to take an account of the rents, received by either of the parties, for the premises; and also of the reasonable annual value of the said lot, while in the occupation of either of the parties, since the death of *Elizabeth Sasser*, the elder.

Christian L. Benzein et al.
v.
J sse Robenett et al.
} From Wilkes.

On the hearing of an original bill, in the nature of a supplemental bill and bill of revivor, depositions taken in the original suit may be read.

In Equity, upon a bill by the mortgagor to redeem, he shall have relief, though at law, the estate of the mortgagee is barred; as upon a disseisin, and seven years' possession with color of title.

This cause was a branch of that of the same Plaintiffs against *William Lenoir* (*Reported Ante p.* 225.) It set forth the same title and the same facts. The two infant children of *Montgomery*, who pending the former suit had married, were, with their husbands, *Montfort Stokes* and *James Wellborn*, made Plaintiffs. The Defendants claimed under *Mary Gordon*, who was a Defendant to the original suit, as to whom it had abated. The present bill prayed a revivor, as to those claiming under *Mary Gordon*, and in other respects, the same relief as that sought by the original bill.

The only additional fact appearing on the pleadings in this case was, that upon payment of the mortgage debt due the *Unitas Fratrum*, the residue of the term created by the deed of *Hugh Montgomery*, of July 23, A. D. 1778, to *John Michael Graff*, had been assigned to *John Brown*, the younger, the executor of *John Brown* the elder, the surviving trustee and executor of *Montgomery*.

At June term, 1829, the case was argued by *Ruffin*, then at the bar, and *Badger*, for the Defendants, upon a motion to suppress the depositions taken in the original case, which were filed in this, and by *Seawell* and *Gaston* for the Plaintiffs. And at this term, it was, on the hearing, argued by the same gentlemen, with the exception of his Honor Judge Ruffin.

Hall, Judge.—The lands in question were part of a tract originally granted to *Henry Cossart*, from whom they descended to *Christian Frederic Cossart*, his son and heir at law. He, in the year 1772, made a power of attorney to *Frederick W. Marshall*, either to sell the lands himself, or to appoint some other person attorney in fact for that purpose. The said *Frederick W. Marshall* did not sell or dispose of the lands, but nominated and appointed *John Michael Graff*, attorney in fact of the said *Cossart*, in the year 1774, with general powers, as he was authorized to do. The said *Graff*, in the year 1778, sold the said lands, as the agent of the said *Cossart*, to *Hugh Montgomery*, for the sum of £2,500. In the same year, *Hugh Montgomery* mortgaged the same lands, for the term of five hundred years, to the said *Graff*, to secure the debt to him, as agent of the *Unitas Fratrum*; he died, and *Fragott Bagge* became his administrator, and in the year 1784, assigned the said term to *F. W. Marshall*, agent of the *Unitas Fratrum*. He devised the lands to *Christian L. Benzein*; he died, and the mortgage term came to the Plaintiffs, his executors.

It further appears, that *Hugh Montgomery* conveyed the land in question, after the date of the mortgage, to *John Brown* and others, trustees for the benefit of his two female infant children, since married to *Montfort Stokes* and *James Wellborn*, who are also Plaintiffs.

The Defendants claim under grants, issued by the State for the same lands, but bearing date posterior to the deed executed to *Montgomery*, and posterior to the deed of mortgage given by him, before noticed.

It appears, that *Mary Gordon* was sued for these lands in the original suit, spoken of in the bill, but that the suit, as to her, abated by her death; and was not revived, as to those, who claim under her. The present bill is brought against such persons; and considering it to be an original bill, in the nature of a supplemental bill, and bill of revivor, I think it is not improper to read the depositions taken in the original suit; though, in the view I take of the case, I shall make no use of them.

The Defendants allege, that the Plaintiffs have no grounds for coming into a Court of Equity; that if they have any right to the lands in question, they should assert it at Law. In the former suit, I attempted to give the reason, why a suit had not been brought at Law. (*Ante p.* 263.) But it may be assumed, that the mortgagee might have brought a suit at Law, and has failed to do so; and that the legal title being in him, he is the only person who could bring such suit; and that not having brought such suit, he is barred by the statute of limitations. It does not follow, of course, that the rights of the mortgagor are concluded by the same bar. He has twenty years to redeem, or as long as the mortgage is recognised by those concerned. (5 *Bac. Abr.* 94.)

I have no inclination, either to repeat or unsay, what appeared to me, in the former suit, to be the correct principle of decision. I will only add to it a few remarks.

It is argued for the Defendants, that they have had a seven years' actual adverse possession, under a color of title—a grant from the State. That may be true, and still their title is not good. It is not true, as a universal proposition, that such a possession gives a title. It only gives title, in the words of the act, against such persons, whose rights or titles shall descend or accrue. Thus, if an estate is made upon condition, that the feoffer shall re-enter, provided he pays or tenders a certain sum of money, on a certain day, twenty or thirty years afterwards. If the money shall be paid or tendered on the day, he may enter, and regain his estate. In this case, the feoffee might be in possession twenty or thirty years, but it would not give him a fee-simple. So if there is a tenant for life, remainder in fee, and tenant for life makes a feoffment in fee, the remainder man may presently enter for the forfeiture. But if he does not enter for seven, or twenty years, provided the tenant for life lives so long, he may afterwards, upon the death of the tenant for life, enter by virtue of his remainder, which has fallen into possession, (5 *Bac. Abr.* 830.) Yet the feoffee of tenant for life, although peaceably possessed during the life of tenant for life, acquires no fee-simple, because the right of the remainder man had not accrued during that time.

Again, and which is more in point, if a man disseises a mortgagee, and levies a fine, and five years pass over the proclamations, by which the mortgagee is bound, yet if the mortgagor pay, or tender the money due on the mortgage, he has five years to prosecute his right, by the second saving of the statute of 4 *Hen.* 7, *C.* 24; because his title did not accrue till payment or tender of the money, by condition made upon cause, or matter before the proclamations, viz.: by the condition made before the fine. (*Plow.* 373.) In this case, we see a person holding an estate in the *post*, altogether unconnected in privity with the mortgagee, nay, holding an estate under a fine levied by the disseisor of the mortgagee, obliged to yield his title to the mortgagor, when the time comes, be it long or short, when the money becomes due, according to the condition in the mortgage. It is true, if the money was not paid at the day, according to the condition, the estate became absolute at law. (*Co. Lit.* 221, 222.) But Courts of Equity consider the mortgagor to be the owner of the land, which is only a pledge for the money lent, and will sustain the right of redemption in the mortgagor, against the same persons from whom the estate might have been wrested at law, in case the money had been strictly and legally paid or tendered, according to the condition. (*Hard.* 465, *Co. Lit.* 35, *Note* z.) It would seem to make but little difference with the possessor of the land, claiming against the mortgagee, if he must be disturbed, whether it is by the mortgagee, or by the mortgagor. There is this difference; the mortgagee can only sue at Law, and that within seven years. The mortgagor, generally speaking, has twenty years, or in some cases longer, if the mortgage shall be recognised as such by the parties. (*Thom. Co. Lit.* 41, *Note*, z.) In the present case, the existence of the mortgage is acknowledged by the parties, and must be admitted by all.

But it is stated in the bill, that the remainder of the mortgage term has been surrendered to *John Brown* the younger in consequence of the money being paid, which was due on it; and it is insisted for the Defendant, that *John Brown* has a remedy at Law. It may be answered, that if there is an end of the mortgage, it is of very recent date before the filing of the present bill; that *John Brown* has not thought proper to sue, and that the Plaintiffs have no remedy at Law; that although the mortgage is now extinct, it stood in the way until very lately, and prevented a suit at Law; that the legal right to the land is now in *John Brown* the younger, and that a beneficial trust was created in the Plaintiffs, under the deed of *Hugh Montgomery*, made to *John Brown* the elder, and others, trustees, &c., and also under the will of said *Montgomery;* that since the mortgage term has become extinct, no time has elapsed, that will impair the equitable rights of the Plaintiffs, or interpose an obstacle to redress for it in this Court, against those trustees, and also against the other Defendants. I therefore think the female Plaintiffs are entitled to a decree, to be based upon the deed from *Montgomery* to *John Brown* and others, trustees, and also upon *Montgomery's* will.

PER CURIAM.—Decree accordingly.

John H. Alley et al.
v. } From Rutherford.
Richard Ledbetter,

A bill, the allegations of which are directly denied by the answer, and supported by one witness only, without corroborating circumstances, will be dismissed.

After a failure at Law, the party cast cannot come into a Court of Equity, merely because the verdict is unjust; unless the matters alleged in Equity do not constitute a defence at law.

Where a discovery in aid of a defence at Law is sought from the conscience of the Defendant, it ought to be obtained pending the suit at Law.

Discovery and relief are never given after a trial at Law, where the matter averred was available at Law, unless the party seeking it avers and proves, that he was ignorant of the defence or evidence, at the time of the trial.

The Plaintiffs were the sureties of *Frederick F. Alley*, late Sheriff of Rutherford, and in their bill alleged, that the Sheriff having a *fieri facias* against the Defendant, had sold one of his negroes to satisfy it—that the sale of the slave produced the sum of $207 83, over and above the amount due upon the execution, which the Defendant then might have received of the Sheriff, but which he then lent him upon his, the Sheriff's individual responsibility.

That the Defendant had sued the Plaintiffs at Law, for the said sum of $207 83 without joining the Sheriff—that although they had heard of the lending by the Defendant to the Sheriff, they knew of no witness by whom the same could be proved on the trial at Law—but that since the judgment in the action at Law, they had discovered a witness by whom they could prove a loan of the surplus, over and above the amount due on the execution. The Plaintiffs prayed an injunction, to restrain the Defendant from issuing execution upon his judgment.

The Defendant, by his answer, denied every allegation in the bill, as to his lending, or forbearing in any way, to *Alley*, the Sheriff, the surplus, in his hands, over and above the execution mentioned in the bill, and insisted that he was needy, and had constantly, but without effect, urged its payment.

Gray Crowe, the only witness examined by the Plaintiffs, as to the main allegation in their bill, swore, that he was at the house of *Frederick F. Alley*, in September, 1820, when the Defendant came there, and asked *Alley* to pay him the surplus in his hands, over and above the amount of an execution, under which a negro of his, *Ledbetter's*, was sold—that *Alley* produced and counted the money, and then asked *Ledbetter* for the loan of it; upon which, *Ledbetter* immediately lent him the amount.

No Counsel appeared for the Plaintiffs.

Hogg, for the Defendant.

Ruffin, Judge.—I think the bill ought to be dismissed, on two grounds. The one is, that the answer directly and positively denies the loan to the Sheriff, and the contrary is proved by only one witness, *Gray Crowe*. If there were nothing particular to be said of his deposition, it is the constant course of the Court to refuse a decree upon the testimony of a single witness, unsupported by circumstances, against the answer, directly responsive to the bill. But it is almost impossible to believe the witness, without the contradiction. The transaction deposed to is, to say the least of it, most extraordinary. That a needy man, whose negro had been sold under execution, and who had the surplus money offered to him, should loan it to the Sheriff, without taking any security therefor, and this after application made by him for the money, cannot readily be credited, without the testimony of more than one witness, uncorroborated in any manner.

But besides this, the Plaintiffs come too late here. They ought to have filed their bill of discovery, pending the suit at law. After a trial there, which they resisted upon the evidence in their power, they cannot come here for a new trial, merely because the verdict was unjust. If the matters alleged be no defence at Law, that is a different case; for then the discovery would be of no avail. But if the discovery now sought might have availed as a defence at Law (which is the case here) then the only excuse for not proving it at Law, either by witnesses or by a discovery from the Defendant is, that the fact was not then within the knowledge of the party. The Plaintiff has no right to discovery and relief in this Court, when by asking the discovery here in due time, he might have had the relief at Law; for that would be altogether changing the forum, by which facts are to be found in the ordinary jurisdiction of the Courts. A jury is primarily to pass upon legal defences; and no transfer of the jurisdiction ought to be allowed, which does not arise from necessity. Here the Plaintiffs admit, they had heard of the loan before the trial at Law. Why then did they not seek a discovery? Can any reason be given, except that they wanted to find where the case pinched?

This, however, it may be said, applies only, where the bill seeks relief upon the discovery in the Defendant's answer solely—where the Plaintiff puts himself on the Defendant's conscience, and not where the relief is prayed upon the strength of evidence newly discovered. In the latter case, the party relies upon his proof. I admit the difference. But it will not help these Plaintiffs; because it does not appear in the evidence, when they came to the knowledge of what the witness knew. As I have just said, Equity does not interfere merely to prevent injustice, but only upon the ground, that the party had it not in his power to have justice done him. He had that power, if he knew of the existence of the witness, and what he would swear. It is, therefore, a material allegation, in every such bill, that the Plaintiff was ignorant, at the time of the trial at Law, of the existence of the fact, or of the witness by whom he can now prove it. And like every other material allegation, it must be proved. This may be always done, at least as to this purpose, by examining the witness as to the period of his communicating to the party his knowledge of the fact, as well as by examining him as to the principal point. Here nothing of the sort has been done. *Crowe* merely proves the loan by the Defendant, and does not say one word why he kept it secret during the suit at Law, nor when he told the Plaintiffs. For anything we can know, he was purposely kept back, lest a Rutherford jury might not think fit to credit the very singular account he gives of the transaction.

PER CURIAM.—Let the bill be dismissed with costs.

EQUITY CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH-CAROLINA,

DECEMBER TERM, 1830.

Trustees of the Organ Meeting House v. William Seaford, et al. } From Rowan.

A Court of Equity will not, upon a dispute respecting the title to church property, decide a religious controversy between its members.

The bill charged, that in 1786, one *Lutric Seffret* executed a deed of conveyance, for a valuable consideration, "to the elders and trustees, and their successors in office, of the Lutheran Congregation belonging to the second Creek Organ Meeting-House," for a tract of land on which a meeting-house was afterwards erected: That under the said conveyance, the predecessors of the Plaintiffs had entered and enjoyed peaceable and uninterrupted possession of the premises, for the purpose of divine worship, according to the Lutheran form, until the year 1820, when a part of the members composing the Lutheran Church adopted a general synod, a form of church government previously unknown to the Lutheran Church—that the Defendants, in the year 1820, were elected elders, deacons and trustees of the Organ Church, in the belief that they would faithfully adhere to the form of church government established by their ancestors—that in violation of the trust reposed in them, the Defendants had sent delegates to the general synod, and had excluded from the meeting-house several clergymen regularly ordained according to the Lutheran form, and also the Plaintiffs and those by whom they were appointed, all of whom adhered to the old form of church government—that in 1826, the Plaintiffs were duly elected and ordained as trustees, elders and deacons, by a constitutional number of those adhering to the primitive church. The prayer for relief was general.

A copy of the deed was filed as an exhibit. It conveyed the land in dispute for the consideration of £5, to "the trustees and elders, and their successors in office, for the Lutheran Congregation, belonging to the second Creek Organ Meeting-House," but was absolute upon its face, not specifying any particular purpose, to which the premises were to be appropriated.

The answer denied, that the Plaintiffs had been duly elected elders and trustees of the Organ Church Congregation; and alleged, that at the time of this pretended election, the Defendants were acting trustees and elders of the church, and that the Plaintiffs, and those whom they represented, constituted a very small minority of the members. These allegations were fully supported by the testimony.

Nash, for the Plaintiffs.

Gaston, for the Defendants.

Hall, Judge.—It appears that the Organ Meeting-House was erected by its members; that the land on which it stands was conveyed to its trustees and elders by the grantor, for the consideration of £5. Whether that sum was the full value of the land does not appear. Nor does it appear, that the grantor belonged to that church, or professed the same tenets, which they held.—

There was no condition annexed to the grant, the observance of no rules of faith, nor church discipline, nor any rules for the government of the church prescribed or enjoined. It was simply a conveyance of the land for a valuable consideration. And as long as the church exists, particularly since the passage of the act of 1796 (*Rev. c.* 457,) the church will hold the land. Whether the grantor would have any claim to it, in case the church were to become Mahometan or Pagan, or profess their belief in the heathen mythology, I am not now, nor shall I ever be called upon to give an opinion. I am also spared from giving any opinion, provided they worship Almighty God according to the dictates of their own conscience. (*See the 19th section of the bill of rights.*) But I am free to give the opinion, that as long as their religious tenets and devotions are confined to the sphere of Christianity, the grantor can have no claim; whether the conveyance shall be considered to be made upon a valuable consideration, or whether it shall be considered to be a donation. If the grantor has no right, on what foundation does the Plaintiffs' claim rest? It appears, that they are seceders from the church, and are not the trustees or representatives of it; that they were a minority of the members before their secession. Had they remained in the church, they must have yielded to the government of the majority.—Much less can they have any control over it, when they are no part of it. It is a rule applicable to aggregate corporations or to societies, that the will of the majority must govern. A contrary rule would be as absurd, as to say, that a lesser number contained more units than a greater.

With respect to the allegation made by the Plaintiffs, that the Defendants, or the church which they represent, have strayed from the true faith, or that errors have crept into the church government, the answer is, that on that question, it is not for them, nor this Court to decide. It might be more than difficult to qualify any earthly tribunal to decide it. As the Plaintiffs are not members of the church, they cannot claim to control it, more than any other persons who are not connected with it.

PER CURIAM.—Bill dismissed with costs.

Barden Tolar
v.
Nehemiah Tolar, } From Wayne.

If a voluntary deed, fairly obtained, is destroyed by the donor before registration, a Court of Equity will compel him to convey the same property to the donee.

The Plaintiff alleged, that his father, the Defendant, being willing to advance him in life, as well as to repay him for services rendered, in February, 1824, conveyed to him in fee-simple 100 acres of land, and also six slaves—that the deed was delivered by the Defendant to the Plaintiff, and was by the latter deposited for safe-keeping with one *Hopton Coor*—that the Defendant afterwards, by some contrivance, got possession of it, and destroyed it.

The prayer was, that the Defendant might be compelled to execute to the Plaintiff another deed for the same property.

The Defendant denied every allegation of the bill, as to the execution of the deed, and averred, that he was very illiterate, and also old and infirm—that he had once executed a will, which he supposed was the paper mentioned by the Plaintiff, by which he divided all his property equally among all his children, and insisted that to be the only instrument he had ever executed disposing of his property; and that if it was not a will, it had been falsely read to him. This he admitted had been destroyed.

Upon replication, many depositions were taken—a statement of which will be found in the opinion of his Honor Judge HALL.

Mordecai, with whom was *Devereux*, for the Plaintiff, cited *Dawson* v. *Dawson* (*ante* 93) *Souverbye* v. *Arden* (1 *John. Ch. Rep.* 240,) *Doe ex. dem. of Garnons* v. *Knight* (12 *Ser. & Low.* 351,) *Worrall* v. *Jacob* (3 *Mer.* 256.)

Gaston, for the Defendant.

HALL, Judge.—The Plaintiff does not call upon the Court for its assistance to supply any defect, or rectify a mistake in the voluntary deed of gift, which is the subject of the present dispute, but to restore him to the evidence of a legal title the deed of gift of which he has been deprived (as is admitted in the answer) by the Defendant's own conduct.

It appears, that the Defendant was an old man, and that his mind laboured under the infirmities incident to old age.—But none of the numerous witnesses examined in the case say, that he was incapable of transacting his business, or of making a contract.

It is clear, that the deed of gift was not executed with precipitancy, but with some deliberation. *Arthur Jones* states, in his deposition, that he saw the Defendant at his father's, and he told him he was on his way to *Hopton Coor's*, to get him to write a deed of gift, and that he intended to give all his property to *Barden*, the Plaintiff. He says further, that he and the family remonstrated with the Plaintiff against the impropriety of giving all to one child.—He persisted in his determination to do so, and said, if *Hopton Coo* would not write it for him, he would get some other person to do it. He would not return until he had accomplished it. This happened two or three days before the delivery of the deed of gift.—*Calvin Coor* says, in his deposition, that the Defendant went to the house of *Hopton Coor*, about the 20th of February, 1821; that he appeared to be in his senses; that he wrote a deed of gift for him; that he signed it, and that he and *Hopton Coor* attested it as witnesses; that by the deed of gift, he conveyed, all the land that he had in possession, and six negroes by the names of *Dorcas, Hardy, Britton, Zeny* and *Jonas;* that the name of the other negro he does not recollect; that the deed was read over to the Defendant; that he expressed his satisfaction with it; that it was delivered to *Barden Tolar,* the Plaintiff; that he told the Plaintiff to go and have it recorded; but that in consequence of something *Hopton Coor* said, the Defendant observed, it would be time enough to have it recorded after his death, and told Plaintiff to let *Hopton Coor* keep it, upon which the Plaintiff delivered it to *Hopton Coor.* In the most important facts stated by this witness, he is supported and corroborated by the testimony of *Dorcas Coor. Arthur Jones* states, that in a short time afterwards, he saw the Defendant, and was told by him that he had executed the deed of gift, and that it was left with *Hopton Coor.*

At this stage of the inquiry, it may be assumed, that title to the property contained in the deed of gift became vested in the Plaintiff. For although it had been placed in the possession of *Hopton Coor,* it had been previously delivered to the Plaintiff, and his placing it there was his own act.—The title to the property had previously passed to him.—That act was not obligatory upon him. He might have had it recorded when he pleased. Several depositions have been read to prove, that the Defendant, on several occasions, declared that he had conveyed all his property to the Plaintiff, excepting perhaps his hogs, chickens, &c., and that he had no right to exercise acts of ownership over it. Other depositions have been read, to prove that he did, on various occasions, exercise acts of ownership, over it, and treated it as his own. These circumstances relative to the management of the estate, prove nothing on either side. It was natural when father and son lived together, that each of them should occasionally use the property, and treat it as if it was his own.

It does not appear, that after the Defendant had regained possession of the deed of gift, and destroyed it, which was a few days after he executed it, that the possession of the property was in any respect changed, until the Plaintiff left his father's, and went to live by himself. Until then, the possession accompanied the title, whether it was in the father or in the son. After their separation, it does not appear that the father had such an adverse possession of either the land or negroes, as would give him a title under the statute of limitations.

Depositions have been read to prove, that the Plaintiff himself did not consider that he had a right to the land or negroes. Some of the depositions say, that the Plaintiff was an ignorant man. Perhaps he might have thought, that his title was divested by the destruction of the deed of gift. If such was the case, his misconception of his rights should not injure him. It is admitted by the Defendant, in his answer, that some days after the execution of the deed of gift by him, he went to *Hopton Coor's* house and applied for it; that *Dorcas Coor* delivered it to him, and he destroyed it.

From an examination of the whole case, I am of opinion, that the Defendant be decreed to convey to the Plaintiff, all the land that he was possessed of at the date of the deed of gift; and that the Master ascertain the identity of it: That he also convey to him the six negroes, with their increase since the date of the deed of gift: That he ascertain the name of the sixth negro, not recollected by *Calvin Coor;* and that this conveyance be made by such a deed as the Master shall approve, without warranty.

PER CURIAM.—Decree accordingly.

William Thompson et al.
v.
Elisha Applewhite.
} From Wayne.

A Plaintiff who claims under a will, which is not admitted in the answer, must produce it, or a copy of it at the hearing, or account for its loss.

One who claims under a will which is not established, must have all the persons interested to contest it before the Court.

The bill charged, that the Defendant, in the year 1807, made an entry with the entry-taker of Wayne county; that before a grant issued thereon, he agreed to convey the land thus entered to his father, *John Applewhite*, and executed a bond, by which he bound himself to have the entry surveyed, and after obtaining a grant, to convey it to his father; that the Defendant had perfected his title to the land, but in consequence of the father's death, the Defendant never had conveyed the land according to his agreement. That *John Applewhite* by his will devised the land above mentioned to his son *Isaac*, who was also dead, leaving the Plaintiffs his heirs at law; and that the Defendant had refused to convey the land either to *Isaac* or the Plaintiffs. The prayer was for a conveyance to the Plaintiffs.

The Defendant admitted the entry as charged in the bill, and that a grant had issued to him; but denied the execution of the bond to his father, as alleged in the bill. He admitted, that long after the issuing of the grant, his father being then very old and on his death bed, *Isaac*, the ancestor of the Plaintiffs, proposed to him, the Defendant, that as the land had always been occupied by their father, and was supposed to have formed a part of his home plantation, that the Defendant should execute a bond to make their ather a title thereto; that for the sake of preserving the peace of the family, the Defendant did then execute a bond to his father, with a condition to make a title, not to his father, but to his brother *Isaac*. But he averred, that no other consideration passed to him, upon executing this bond; and shortly thereafter it was by the father, with the consent of *Isaac*, cancelled. The Defendant admitted the devise of his father to *Isaac* of the home plantation, but denied that the land in dispute formed any part thereof, or that it would have passed by the will, supposing the father to have had title thereto. He averred, that *John*, the father, left two other children besides the Plaintiff and himself, and contended, that if the father had title thereto, the Plaintiffs were entitled to only one-fourth thereof, as it did not pass under the will of the father.

A replication was taken to the answer, and several witnesses were examined, whose depositions were read at the hearing. But there was no copy of the will of *John*, the father, filed as an exhibit; it was said to have been lost after probate, but before it was recorded—but there was no proof of this fact.

Mordecai, with whom was *Devereux*, for the Plaintiff.

Gaston, for the Defendant.

HENDERSON, Chief-Justice.—Proof of the devise to *Isaac* is indispensable, to support this bill. If the fact be, as charged in the bill, that the condition of the bond was to make title to the father, most certainly he who claims as his devisee, must show a devise. If it be, as insisted on in the answer, that the condition was to make title to *Isaac*, the circumstances attending its execution prove most clearly, that such condition was introduced as ancillary to the will. So far, therefore, the condition was testamentary, and fell to the ground, either by revocation of the will, or if the will-was not executed to pass real estate, or by any other cause which rendered the will inoperative. But the weight of evidence is in favor of the case made in the bill. Neither the will, nor a copy is offered in evidence; but the answer admits a devise to *Isaac* of the home plantation, but denies that the lands in question are embraced by that description, and there is no evidence to prove that they are. The deposition of one witness, taken evidently to another point, renders it somewhat probable that they are part of, or adjoin the home plantation. But it by no means proves it satisfactorily. The depositions of the other witnesses state, that by the will the lands were devised to *Isaac* This is giving parol evidence of the contents of a paper without proving its loss, or that it is beyond the reach of the party offering it. And besides, they do not state the words or substance of the devise. The bill must therefore be dismissed, for want of proof of the fact of the devise.

The bill is objectionable for want of parties, the heirs of the father; as they are interested in contesting the devise. For if not devised, the lands descend to all the heirs. The bill is silent, who are the heirs, and therefore does not make a case proper for a decree. But the answer states expressly, that there are two other heirs, not before the Court. If the case made had been supported by the evidence, this defect might have been aided by an amendment. But we cannot get over the defect in the proof.

PER CURIAM,—Let the bill be dismissed with costs, but without prejudice.

John Huson et al.
v.
Joseph McKenzie et al. } From Lincoln.

A creditor of an executor, who has taken a security for his debt upon the assets of the testator with notice, cannot hold them against the legatees.

A single act of mal-administration cannot be made the foundation of a suit against an executor; but the whole administration must be inquired into, and if the frame of the bill does not permit this, it must be dismissed.

A bill brought by some of the persons entitled under a residuary clause in a will, without making the others Defendants, or accounting for the omission, cannot be supported.

The bill was filed by three of the infant children of *William Huson.* It stated, that their father, by his will, devised as follows: "I will that my wife, *Mary Huson*, shall have "such part of my land, as she, with her children and negroes "which are left to her, can attend under crop annually, during her natural life or widowhood, and the balance of "cleared land I will that it be rented out annually by my "executors, until my children come of age to take it into "their own possession. As to my negro woman *Tempe*, "and my two negro boys, *Stephen* and *Leo*, my will is, "that these negroes be hired out annually, and the monies "arising from their hire, be appropriated to schooling my "children, or as much of it as may be necessary to give "them a good English education, and the balance of the "said hire (if there be any) shall be reserved to meet accidental occurrences (the death of slaves specifically bequeathed) if these should happen; if no such occurrence "should arise to call for a particular distribution of the "above monies, then, and in that case, my will is, that it be "equally divided among all my children—and I will that "these negroes directed to be hired out, be hired until my "youngest child comes of age; after this, they shall be "equally divided among all my children." That all the executors, except *Mary Huson*, the mother of the Plaintiffs, refused to qualify, and that she alone proved the will—that she wasted the estate, and married one *Friddle*, who was made a Defendant — that *Friddle* executed a lease to *McKenzie* for the land, and also hired to him the two male slaves mentioned in the will, as a security for a debt—that this lease and hiring were in fraud of the trust reposed by the testator in his executrix, the wife of *Friddle*, and that the Plaintiffs did not receive from the rents of the land and the hire of the negroes, that education which their father designed they should have, as it was entirely consumed in paying *Friddle's* debt to *McKenzie.* The prayer was, that the land and slaves might be surrendered by *McKenzie*, and rented and hired by the Master, for the purpose of educating the Plaintiffs.

The will of *Mason Huson* was filed as an exhibit, and it appeared from it, that he left six children, and his wife *enciente* with another, to five of whom, and the one unborn, he had bequeathed the residue of his estate, as a daughter, *Elizabeth*, had been provided for by her grandfather.

The Defendant, *McKenzie*, who alone answered, admitted the conveyance by *Friddle*, as charged in the bill, but insisted that he was not accountable for a waste of the assets committed by *Friddle* or his wife.

The case was submitted by *Gaston*, for the Plaintiffs.

No Counsel appeared for the Defendants.

Ruffin, Judge.—The bill is filed for the purpose of setting aside a conveyance, made by *Friddle* and wife, to the other Defendant, on the ground, that the executors fraudulently conveyed, in payment of a private debt, the estate of their testator, which they held by the express terms of the will, in trust for the children of the testator. The Court has looked into the will, and the answer of *McKenzie ;* and it thence appears plainly enough, that the deed cannot stand, unless upon the general accounts of the estate, debts of the testator, or a balance due the executrix, shall be found to justify such a disposition of the property as has been made. Upon the merits, as now indicated, there would be no hesitation in decreeing the relief prayed. But the will itself is so fatally defective, that nothing can be made of it. The will carries the rent of the lands, and the negroes, and their hires and issues, first to the education of the children, and then into the general residue of the estate, after making up such losses as might occur in the legacies by the death of the slaves, specifically bequeathed ; and the will shows five children, besides *Elizabeth* (who is excluded from the residue) and the unborn child of which the testator thought, that his wife might be *enciente*. The bill is brought by only three of the children, without making any of the others parties, or assigning a reason for the omission : and it prays simply, that this conveyance may be declared void, and the estates conveyed to some other trustee.

It is impossible, that isolated acts in the course of an administration can be made the subjects of a suit. Their merits cannot be determined, without going into the whole estate, and there is nothing in the pleadings to cover such an extended inquiry. The Court cannot permit litigation to be multiplied by splitting up a mal-administration into all its particulars, and making each the subject of a suit. The whole forms but one trust and subject of litigation. Parties, under such a practice as is attempted, would be ruined by costs, and the Court harrassed continually by repeated investigations of the same matter. Besides, all the parties in interest must be before the Court. How can we declare the conveyance void, and deprive the executors of the trust, and appoint another trustee, without knowing the wishes of the other legatees ? If indeed a formal party alone were waiting, the Court might overlook it, or send the case back, to have the defect supplied. But here the cause is brought to a hearing, upon a bill so entirely founded on a misconception, and defectively framed, that it is incapable of amendment, without making a new case altogether.

Per Curiam.—Decree, that because it appears from the will of *Mason Huson* in the pleadings mentioned, that there are besides the Plaintiffs other residuary legatees, who by said will are entitled to shares in the testator's estate, and particularly in the portions of it in controversy in this cause, and they are not made parties to the suit, nor any reason assigned for the omission; and because no general account of the testator's estate is sought in the bill, or can be taken under it, the bill is dismissed with costs. But declare, that this decree is without prejudice to any proper bill to be brought by the Plaintiffs for such general accounts, including the subject matter of the present bill.

Alvia Spear
v.
Bezaleel Gillet, } From Wake.

Where, upon a contract by copartners, made in Virginia, the bond of one was taken to secure the partnership debt, it was *held*, that if by the law of that State the contract be joint, the execution of the bond extinguished the debt; if joint and several, that it was no merger of the simple contract debt against the other partners; and as the creditor had a plain remedy against them at Law, a Court of Equity could not aid him, further than by a discovery; and this, although he averred, that the bond was executed in the copartnership name by one copartner, in ignorance on his part, that it did not bind the copartnership.

The case made by the bill was, that the Plaintiff, a resident of Virginia, in the year 1819, sold to a copartnership, which he then thought consisted of *Leonard Merriman*, *John Merriman*, and *David Gillet*, a quantity of goods—that being ignorant of the rule of law, that one partner could not bind the copartnership by deed, he took from *Leonard Merriman*, who made the purchase, an instrument signed and sealed in the copartnership name; that being advised that the other partners were not bound by the bond executed by *Leonard Merriman*, the Plaintiff commenced an action against him alone, and had, upon final process, imprisoned him; but being entirely insolvent, he had been discharged under the insolvent laws. That since the discharge of *Merriman*, the Plaintiff had discovered that the Defendant was also a member of the copartnership of *Merriman & Gillet.*

The bill prayed for a discovery, and that the Defendant might be decreed to pay the Plaintiff the amount of the bond executed by *Leonard Merriman.*

An answer was filed, and proof taken; but a summary of them is unnecessary.

W. H. Haywood, for the Plaintiff.

Gaston & Devereux, for the Defendant.

Ruffin, Judge.—A very evasive answer, in this case, raises a strong suspicion in my mind that the Defendant was a partner, which is fully confirmed by the proofs. I should therefore be pleased, if I could, to make him liable to a debt which he justly owes; and especially since the nature of his defence here has held up the case, until it is too late to sue at Law. But I believe there is no ground for this Court to relieve on, and the bill must be dismissed.

If the contract is to be regarded as joint and several, or although made in Virginia, if it can be enforced here, under our statute, by a joint or several suit, the bond of *Merriman* did not extinguish it, as to any body but himself. That is common doctrine; and is exemplified every day in suits being brought against one joint and several obligor, after a judgment against another. The remedy at Law by *assumpsit* remained against the other partners, after *Merriman* had given his bond. It is not like a release, which supposes or imports a satisfaction. It is simply an extinguishment of the simple contract, as far as regards *Merriman* and no further.

If on the other hand, the contract of partners is by the Law of Virginia joint, and not joint and several, then it is extinguished altogether by taking the bond of one of them; because it is as to the obligor himself, and the others cannot be sued without him. If the others are sued separately, they may plead it in abatement. If they are all sued jointly, then the bond is a bar. It is like the case of a judgment against one of two joint obligors; after which the security cannot be further proceeded on, and is lost. (*Brown* v. *Wooten*, *Cro. Jac.* 73.) Is there any thing to induce Equity to interpose? The party has himself extinguished his legal remedy for a mere legal demand. The mere loss of a debt does not raise an equity. Negligence or mere ignorance does not call into action this jurisdiction. That is the party's fault. There must be some accident, fraud or mistake. When he took the bond of one partner, it is proved that he trusted that one. He cannot say that he is entitled to a better security now, because he might have had it at first, if he had chosen. He made his selection, and must abide by it. In the present case, the bill admits that the Defendant was not trusted; for the Plaintiff did not know him as a partner, and never discovered that he was until after judgment against the other. His own folly in trusting a man unworthy of it, or in omitting to ascertain whom he had bound for the price of the goods before he took a security, by which a part, then legally bound, became discharged, cannot be helped. If this had been a subsequent arrangement, upon any representation that there were no other partners at the buying of the goods; or if it were shown, that the goods were bought under an agreement to conceal the partners, and with a view to

Merriman's insolvency, the matter would be different. That would be a fraud. But here, the scope of the bill is to get a security, which the Plaintiff admits he did not contract for, upon the ground that at Law he had it without his knowledge, and without his knowledge has lost it. There is no such head of Equity, that I know of. This is not like following the assets of a deceased partner, upon the insolvency of the survivor. That goes upon the idea, that both were trusted, and each looked to, and the accident of the death of one shall not defeat the creditor. But that idea is completely rebutted, when a several security is originally taken from one of the partners. I repeat, that the whole ground of the bill is, that the Plaintiff, in willful darkness made a bad bargain in the exchange of securities. When he gave up his remedy at Law by his own act, he gave up that in Equity—there being no fraud.

HENDERSON, Chief-Justice.—The Plaintiff has come into this Court, upon a clear case for an action of *assumpsit* at Law, for goods sold to a firm of which he alleges the Defendant was a partner. If indeed he had alleged, that he could not prove the fact of a partnership, and asked for a discovery to aid him at Law, this Court would have granted him the aid required; but cannot, where there is a *clear* legal remedy, give relief. The giving of the bond by one copartner certainly does not extinguish the simple contract debt, as to the other; for merger, which is an operation of the law, never works an injury. The bond could not merge the simple contract, but as to those who were *bound* by it; *as to them a written evidence and higher remedy* are given. If, therefore, a person gives a bond for his own simple contract debt, the simple contract debt is merged; but not so, if he gives a bond for his own bond debt. The latter may possibly be given *in satisfaction* of the former; but there is no merger. So, if one gives a bond for the simple contract debt of another, the simple contract debt is not merged, and may be enforced. If a creditor sues one of two obligors or promissors, and obtains judgment, the original suit as to the other remains, and is not merged in the *judgment ;* and may be sued on as if no judgment had been obtained. This is every day's practice and experience.

PER CURIAM.—Let the bill be dismissed with costs.

William Davidson
v.
Thomas L. Cowan, } From Mecklenburg.

A judgment creditor is not affected by notice of a prior unregistered mortgage, and is, in this respect, distinguished from the vendee of the mortgagor himself. Therefore, the Court will not enjoin such creditor from selling the mortgaged premises, under his execution.

The facts stated in the bill and answer were the same, as those reported in the cause at Law between the same parties (2 *vol. Law Cases, p.* 533.) The bill prayed an injunction against an execution, issuing on that judgment, upon the ground, that at the time the Defendant recovered his judgment, as well as when the negroes of *McCulloch*, mortgaged to the Plaintiff, were seized under the first execution, the Defendant had notice of the mortgage, although it was not then registered.

Gaston, for the Plaintiff.

Nash, with whom was *Badger*, for the Defendant.

RUFFIN, Judge. This cause might well be decided upon its particular circumstances; since the agreement of the parties, mentioned in the pleadings, would conclude them, and the judgment at Law is upon that agreement.

But it may be serviceable to the profession and the community generally, for the Court at once to declare the law upon the general question made ; as the whole Court has a clear opinion on it.

That question is, whether a notice of an unregistered mortgage or deed of trust, acquired by a creditor by judgment of the mortgagor, before a sale on his execution, affects the creditor, and sets up the deed. And we think not. There is no equity against a creditor, restraining him from using all legal means to obtain a preference, and ultimate satisfaction of his debt. The period of contracting the debt is wholly immaterial. One creditor may justly obtain satisfaction, although he knows that he thereby deprives his debtor of the means of paying a debt previously contracted. Nothing but the actual divesting of the debtor's estate, or a specific valid *lien* on it at Law, can defeat a creditor. If he obtains his execution before an elder debt is ripened into judgment, he may satisfy himself. If he gets the legal preference by his execution, before a creditor by a mortgage perfects his title by registration, he may likewise satisfy himself. Each has an equal equity, and one has the law. He may keep it. The case of a purchaser is entirely different. He has no equity, if he buys what he knows another cannot rightfully sell. He claims under the mortgagor, by a contract made in fraud of another. He is not obliged to lay out his money, and does it at a risk. A creditor claims against both mortgagor and mortgagee, and is seeking, not to deprive another of his rights, but to save himself. In such a storm, he who can lay hold of a plank, by getting the advantage at Law, shall not be deprived of it. As against a creditor, the deed is not valid until registration ; and if it be not registered before the *teste* of the creditor's execution, it does not stand in his way.

Per Curiam.—Let the bill be dismissed with costs.

William M. Wall, et al.
v.
Duke Scales, Adm'r. of Abner Walker, et al.
} From Rockingham.

An agreement by parol, made before the act of 1819 (*Rev. C.* 1016) by a father, in consideration of the marriage of his illegitimate daughter, to settle all his estate upon her husband, herself, and the issue of her marriage, is binding; and although it does not attach specifically upon any portion of the father's property, so as to defeat a purchaser with notice, yet it will be enforced against volunteers claiming under him. For though the relation between the father and the illegitimate daughter is not a sufficient consideration to raise a use, yet the intervention of the husband extends to the wife and the issue.

In executing such an agreement, care will be taken of the interest of the issue—and the husband submitting, the estate was limited to him for life, with a power to make advancements upon the marriage or full age of the children; with remainder to the issue, as tenants in common, and cross remainders between them, upon their death under age and unmarried.

The plaintiffs alleged, that the intestate, *Walker*, had an illegitimate daughter, called *Elizabeth Covington*, to whom he was much attached, and who had been reared by him in his own house; that when the daughter attained a proper age, *Walker* was very desirous to see her respectably married; that the Plaintiff, *Wall*, being in every respect a suitable match, paid his addresses to the daughter, and was informed by *Walker*, that in the event of the marriage, he, *Walker*, would, at his death, give the Plaintiff, *Wall*, all his estate; that in pursuance of the agreement thus made, a marriage was solemnized between the Plaintiff, *Wall*, and *Elizabeth Covington*, the daughter; that she was dead, leaving the other Plaintiffs, the issue of the marriage; that *Walker* had died, without lawful issue, and without making any settlement of his estate, pursuant to his agreement with *Wall*, and that administration upon his estate had been committed to the Defendant, *Scales*; that he was seised of a valuable real estate, which had descended to the other Defendants, his heirs at law.

The Plaintiffs prayed an account of the real and personal estate of *Abner Wall*, and that it might be settled in pursuance of the agreement set forth in the bill; the Plaintiff, *Wall*, submitting to any apportionment of it between him and the other Plaintiffs, which might be directed.

The Defendants did not admit, nor positively deny the agreement set forth in the bill; but held the Plaintiffs to proof thereof.

Many depositions were read at the hearing, which will be found stated in the opinion of his Honor Judge RUFFIN.

Gaston, for the Plaintiffs.

Nash, *contra*.

RUFFIN, Judge.—The bill is filed to obtain the specific execution of a contract between the intestate and the Plaintiff, *William M. Wall*, upon his marriage with *Elizabeth*, a natural daughter of *Walker*. It is alleged in the bill, that *Walker* agreed, with a view to the marriage, and, in consideration of it, to give all his estate, upon his death, to *Wall* and his wife.

The bill charges, that *Elizabeth* was *Walker's* daughter, and that he was unmarried, and had no other issue; that he acknowledged her; took her from her mother in tender infancy, and received her into his own house; where, being a man of good estate, he bred her up genteelly; that when she grew up, he frequently expressed his wish, that she should marry respectably, and declared, that if she married to please him, he would settle all his property on her at his death. It further charges, that the Plaintiff addressed her for a considerable time with the knowledge and approbation of her father, and married her with his free consent.

A question might arise on the case thus stated--which is fully supported by the proofs taken on both sides—whether a man who holds out a ntaural daughter to the world, as the future successor to his estate, for the sake of advancing her in society, and marrying her respectably; who encourages the addresses of a young man of good property and standing, without coming to some specific understanding with him, that those expectations naturally arising from his conduct, must be still regarded as dependent upon his good will and bounty; can be allowed afterwards to treat such declarations as mere expressions of affection, and not binding on him. The case of the young people is much stronger in this point of view, than if the daughter were legitimate. Then such general declarations might be referred to the succession by law, which would render unnecessary any act of the parent. But all the parties here knew, that some act was indispensable, and that there was no possibility of the estate going, as contemplated, without a settlement or contract of some sort. It is to be expected that, upon marriage, every person of either sex has a care for some provision for the family. They ought to do so. In ordinary instances, this may be deemed sufficiently secured by the natural affection of the parent, and the descents and distributions by law in cases of intestacy. But where an illegitimate is concerned, nothing but a contract is any guarantee. This raises a strong presumption, that such declarations were intended to procure an advantageous match; that they did raise expectations, as designed; and that the marriage took place on the faith of them. It would be a material inquiry, whether the father should be allowed absolutely to dissappoint them. Would it not be a fraud on the marrying parties, and through them on the issue? To avoid that, would not the Court be obliged to hold such a contract? But the case does not depend upon implying a contract; as there is full evidence that one was expressly made a short time before the marriage.

It is to be remarked, that the transaction occurred in 1816, and of course before our act, requiring all contracts for the sale of land and slaves to be in writing. Happily no such controversies can now arise, where the fact of the contract and its terms will not more explicitly appear, than by uncertain and contradictory parol testimony.

But in few instances could parol testimony be more consistent and satisfactory, than in the present. Almost every one of the numerous witnesses in the cause proves, that *Wall* had visited the young woman at her father's, and had been engaged to her for a considerable time. This was not only known to *Walker*, from his own observation; but *Wall* had mentioned it to him, and obtained his consent. The marriage did not immediately take place; and unfortunately, the parties became too intimate, and the daughter became pregnant.

John Scales, who married a niece of *Walker* and lived within half a mile of him, says, that the marriage took place on Thursday, and that on the Sunday before he was at *Walker's*, when the latter first discovered his daughter's situation. *Wall* was immediately sent for, and came. *Walker* seized his gun, and swore he would kill him; to which the other replied, "*fire away—I am not afraid of your gun; but I am not to be forced into measures.*" The gun being taken away, *Walker's* passion subsided. He wept, and calling for his daughter, sat down and took her on his knee, and made *Wall* sit beside them. He then said, "you have ruined my happiness. Did I not tell you, *when you spoke to me for my daughter*, that I had willed her all my estate. Will you destroy my hopes, and not marry her now? *And I now promise you, if you will marry Betsey, I will give you all my estate at my death.* You may come and live with me, and make all you can; all I want is my support while I live." *Wall* replied, that he had made no promise to his daughter, which he did not intend to perform;

and said he would marry her, and did so that week. This witness says, that besides himself there were present *Richard Webster*, *Joseph Alley*, *Phillip Alley*, and a female named *Crawford;* that *Webster* was the person sent for *Wall*, and had gone before he, *Scales*, got to *Walker's*, and that *Wall* and *Webster* came back together.

Many depositions have been taken to prove frequent disagreements between *Walker* and *Wall.* They establish, that *Walker* made two wills, in favor of *Wall* and his family, and destroyed both, while displeased with *Wall;* that they twice separated, and that *Walker* declared he would leave them nothing. *Wall's* wife died shortly before her father; and the old man himself died after a very short illness. There is also evidence, and a great deal of it, respecting the possession of a tract of *Walker's* land, on which *Wall* built a mill, and whether that was built out of the funds of the one or the other. The whole of these proofs are laid out of the case; because the circumstance itself is only material, as denoting the existence and nature of the original agreement; and is not sufficient, if established, according to the wishes of the Defendants, to repel the mass of direct proof of the agreement. And on the other hand, it is not needed by the Plaintiffs to support their witnesses, who speak to the agreement.

The witness, *John Scales*, further states, that hearing *Walker* was sick, he called to see him; found him very ill, and uneasy because he had no will. He said, that he wished *Betsey's* children to have his estate; that if he had succeeded in his attempt to legitimate her by act of Assembly, that would have secured it; and that he had intended making another will. *But he still hoped, that the contract made with their father before marriage would carry the estate.* *Walker* died the next day.

The answers do not admit, or positively deny the agreement. But this witness, if credible, proves it clearly; and also proves, that its recognition was the last act of the father's life.

Attempts are made to discredit *Scales.* Two persons speak of his general character being bad; while many others prove it to be very good, and that if the agreement be not established, his wife's mother, being *Walker's* sister, has a large share of the estate. An effort is made to contradict him. *Webster* says, that he did not see *Scales* at *Walker's:* that *Elizabeth,* without her father's knowledge, desired him to go for *Wall,* whom he found at his father's, and to whom he delivered the message, stating the discovery which had been made. He says, that *Wall* said he did not believe that to be her situation, but went, and on the way declared that he would perform all his promises. Upon getting to *Walker's,* he met *Wall* at the porch with his gun, and threatened to shoot him; that the gun was taken away from *Walker,* and he, *Webster,* went away without going into the house. This was two hours in the night. This plainly does not contradict *Scales,* but supports him, as far as it goes. *Scales* might have been in the house; or he might have been at the door, and not seen by *Webster* in the dark, or attracted his attention in the affray.

Phillip Alley says, that he lived at *Walker's:* that *Scales* was there in the evening, but had gone away before *Wall* came, he thinks; at any rate, that he does not remember seeing them there together. But this witness admits that he himself was there, and heard what passed between *Walker* and *Wall,* and in a second deposition, he states the whole substantially as *Scales* does; and in many important particulars, literally so: as does *Joseph Alley,* the other person said by *Scales* to have been there. And it is in proof, by a person who staid at *Scales's* on that Sunday night, that when he came home, he gave his family a relation of all that passed, corresponding with his deposition. And *Orr* who is one of the witnesses, who says *Scales's* character is not good, admits that on Thursday morning, the wedding day, *Scales* told him the marriage was to take place, and upon *Orr's* expressing a doubt whether *Wall* would marry the girl, said he certainly would; for that *Walker* had agreed on Sunday night, to give them all his property; and then proceeded to relate what he heard pass, as it now appears in his deposition.

Divers witnesses speak to *Walker's* frequent declarations in favor of *Wall*, after the marriage. But it is unnecessary to advert to them particularly, because unless very precise in their terms, and appearing to be deliberate, and made with a view of having evidence to them, the Court would not perhaps decree on more subsequent declarations. They might rather be considered as testamentary, than as establishing a contract.

But I will not omit the statements of two other witnesses, who testify to conversations in the intermediate period between Sunday and the marriage. The one is *John Whitworth*, who says, that *Walker* was very uneasy at his daughter's situation; and told him, that the parties had been engaged for a considerable time, and that he had promised *Wall*, if he would marry her, he would leave them all his estate at his death. The other is *Richard Wall*, the father of the Plaintiff. He says, that *Walker* came to his house, and applied to him to promote a speedy marriage, and declared that if it took place, they should have all he was worth at his death.

Upon this proof, the Court cannot but establish the general agreement alleged in the bill, that *Walker* should at his death, devise, or in some other way settle, his whole property upon the parties to the marriage, or their family.

To the validity of this agreement several legal objections have been made at the bar.

The first is, that it was without consideration, since *Elizabeth* was a bastard, whose relation to *Walker* is not sufficient to raise a use. If this contract rested between *Elizabeth* and her father, the objection would be a good one. But *Wall* intervenes, and *his* marriage is the consideration, and extends beyond himself, and embraces his wife and children. Parties to marriage agreements may well, and generally do bargain for the wife and issue; because no man chooses to be burdened with a family without a provision.

Another is, that the agreement is founded in the criminal seduction of the daughter, and was extorted from *Walker* in a moment of passionate grief at her disgrace, and ought not to be enforced. Whether this reason, if founded in fact, would reach the children, and not be restricted to *Wall* himself, and so would not benefit the Defendants, but only confine the relief to a part of the Plaintiffs, need not be considered; because the Court thinks, there is no ground for it in the evidence. If it could be seen, that the estate was *Wall's* object; that he obtained the confidence of the father, and the affections of the daughter, for the purpose of betraying both, as a means of securing a settlement; or even after he had degraded her, that he delayed to fulfil his engagement, for the sake of getting a specific contract, which he knew the state to which he had reduced the family, would compel them to yield, the Court could not enforce the contract, in favor of the person who had obtained it by such flagitious and deliberate treachery. The extreme impropriety of his conduct is fully felt. But as far as we have evidence, we cannot say that it is not entitled to all the palliation, which passion and youth—not refined and guided by an elevated sense of honor, and a better education—can give. No deeper and more selfish purpose seems to have been cherished by him. He was not himself aware of the full consequences of the immoral intimacy, until *Webster* communicated the young woman's message. He promptly obeyed it, expressed his disbelief in it, and voluntarily declared his obligation and intention to marry her. It is true, he did not appear before her father, professing that penitence which he ought to have felt; nor offering that reparation that was due from him. Perhaps the violence of *Walker* put it out of his power to exhibit the emotions he felt. Self respect was an insuperable obstacle to doing even justice, when demanded at the muzzle of a gun, and that in the presence of the woman, whom he had promised and intended to make his wife. He must have been dastardly, as well as criminal, if he had said less than "I am not to be forced into measures." But as soon as *Walker* desisted from violence, and was accessible and appeasable, *Wall* declared himself ready to perform all his promises.—There was no hint or insinuation about the estate on his part. All that came from *Walker* himself, and not for the first time; for he said, "I have always told you, that I had willed "*Betsey* my property. Did I not tell you so, when you "asked me for her ?" And he has proved a kind and affectionate husband, and a provident head of a family.

The last objection is, that this contract has nothing specific in it, and did not bind the property. That is true; but it bound *Walker*, and his heirs and executors. A general covenant to settle lands does not create a lien on any particular lands; but it is a debt on the estate. *Walker* could certainly dispose of his property, sell it, and waste the money. Purchasers would have a good title, unless they became so, for the purpose of enabling *Walker* to evade the contract. But volunteers are bound by it, just as much as if a bond had been given; and there are several cases, in the books, of two persons giving bonds to make the one the other's heir.

The generality of the agreement however makes it necessary that it should be considered, in what way the estates are to be settled. The contract was to give *Wall* and his wife the estate at *Walker's* death. This, literally taken, would vest the whole personalty in *Wall*. It appears that *Walker* made two wills, in one of which he devised to *Wall* himself; in the other to his wife and children. *Wall* was privy to, and satisfied with each. The spirit of the agreement probably was, as understood by them, that *Walker's* estate should come into the family; and he would have considered himself as fulfilling it, by devising to all or any of them. Had he done so, it is not certain that his disposition would have been disturbed. But as he died without expressing his wishes, the Court is obliged to execute the agreement upon general principles—which lead us mainly to the case of the issue of the marriage, whose interests must be taken as weighing most with the party, from whom the estate moves. In the present case, too, the difficulty is the less, because the Plaintiff, *William M. Wall*, submits in the bill to take in connection with his children. The nurture and education of his children, and his respectability of the family, and their advancement in life, when they shall grow up, require that the father should have a life estate in the whole, with the power of giving to each of the children his or her share, the sons at full age; and the daughters at marriage or full age; remainders to the children as tenants in common, with cross remainders between themselves, upon their death under age and unmarried— which will be ordered, unless the parties lay another settlement before the Court, which will be more to the interest and convenience of the family.

The Master must therefore be directed to inquire, what real and personal estate *Abner Walker* left, and take an account of the same in the hands of the administrator and heirs at law, and of the rents, issues and profits; and the Defendants, the heirs at law, be decreed to deliver up the possession of the lands to the Plaintiff *William M. Wall*; and upon the coming in of the report, to execute conveyances for the specific lands therein found, to be approved by the Clerk of this Court, to a trustee to be named by the Plaintiffs, upon the trusts before mentioned.

Per Curiam.—Declare the marriage agreement charged in the bill to have been made between the Plaintiff and his wife *Elizabeth*, of the first part, and *Abner Walker*, reputed father of said *Elizabeth* of the other part, that said *Walker* would devise to, or settle on the Plaintiff and his wife, if they intermarried, his whole estate, real and personal, at his death, to be established: declare further, that said *Walker* having died without making any devise or settlement of his said estates, this Court will order the same agreeably to Equity; and thereupon decree that the Defendants do forthwith surrender into the peaceful possession of the Plaintiff all the lands which said *Abner* died seised of or entitled to, and which descended to said Defendants as heirs at law, and are now in their possession respectively, to be settled as hereinafter directed; and order further, that the Clerk inquire what particular lands descended from said *Abner*, where situate, &c. And it is referred to the Clerk to take an account of the rents, &c., and also an account of the personal estate of said intestate, in the hands of his administrator, and report the particulars, after allowing just disbursements and charges; and decree further, that upon the coming in of said report, whereby the said estates shall be ascertained, the same shall be conveyed by proper parties to a fit trustee, in trust for the Plaintiff during his life, remainder to his four children, with cross remainders between the said four children, if any of them should die under the age of twenty-one years and unmarried, with power to the Plaintiff to give to each of the said children, his or her share or fourth part, the sons respectively upon their arrival at full age, and the daughters respectively upon their arrival at full age or marriage; unless in the mean time the parties lay before the Court another settlement, &c.

Nimrod Lunsford
v.
Jacob Bostion, } From Burke.

Although a misdescription of land, as to the County in which it lies, would not vitiate in a deed between individuals, it seems, that a similar mistake in a grant would avoid it even at Law; because the grant is founded upon an entry and survey, which are to be made by sworn officers in the very County mentioned.

But if such misdescription in a grant does not avoid it, clearly an entry made in one County, when the land lies in another, is void. And a Court of Equity will not compel another person, who made an entry and obtained a grant for the same land, with notice of the former defective entry, to convey to the first enterer.

Where the Plaintiff averred, that land entered by him was situate in one County, where he made his entry, and that the Defendant had, with notice of his entry, obtained a grant for the same land, upon an entry made in another County, it was held, that if the land did lie in the County where the Plaintiff's entry was made, his title was purely legal, and the remedy at Law complete.

A reference is never made, to establish a fact put in issue by the pleadings; but always relates to some matter supplemental to the relief granted at the hearing.

The bill was filed in the year 1820, and the Plaintiff alleged, that in October, 1811, he made an entry of 640 acres with the entry taker of Burke County, "adjoining his own line, and *Jacob Bostion*, and the Iredell County line." That on the 8th of January, 1812, a warrant of survey issued to the Surveyor of Burke County, which was returned, and on the 24th of November, 1813, a grant of the land, thus entered and surveyed, was made to him. That the Defendant, having notice of the entry above mentioned, had in December, 1811, and January, 1812, made entries of part of the same land, with the entry-taker of Iredell County, and had, by falsely suggesting the land to be vacant, obtained grants thereon in December, 1812, and that the Defendant had taken possession of the land covered by his grant, and refused to surrender the same to the Plaintiff. The bill then averred, that the land granted to the Defendant was actually situate in Burke County, and prayed that the Defendant might be decreed to be a trustee for him, and for a conveyance.

The Defendant, in his answer, admitted, that after the entry made by him, which he averred, was in December, 1810, and before a grant issued thereon, he heard that the Plaintiff had made an entry of the same land. He stated, that he could not answer with absolute certainty, whether the land was situated in Burke or Iredell, as the line between the two counties had never been properly settled; but averred, that according to his honest belief, it was in the county of Iredell—his entry called for the dividing line between the two counties. The entries and grants were filed, and from them it appeared, that the Defendant was correct in his account of their respective dates.

A replication to the answer was filed, and many depositions respecting the line between the two counties, were taken. A summary of them will be found in the opinion of his Honor Judge RUFFIN.

Gaston, for the Plaintiff.

No Counsel appeared for the Defendant.

RUFFIN, Judge.—The bill is filed to obtain a conveyance of a tract of land, which the Defendant entered in Iredell County; for which, in December, 1812. he obtained a grant, describing it as lying in Iredell. The Plaintiff alleges, that the land is in fact situate in Burke County, and that before the entry of the Defendant, and within his knowledge, he had himself entered it in Burke. and obtained a grant in November, 1813.

Upon that notice, and upon the distinct ground, that the Defendant's entry and grant are void, because the land lies in Burke, the equity of the bill is raised.

The answer and the Defendant's grant show, that one of his entries was prior to that of the Plaintiff. But it is unnecessary to discuss the particular circumstances on that point, since the opinion of the Court is determined by other considerations.

The first observation which occusr is, that if the principle assumed in the bill, that the validity of the entry and grant depends upon the land being in the county mentioned in it, be correct, notice is immaterial. For the Defendant's defective title would not be helped, by ignorance of the previous valid entry of the Plaintiff. On the other hand, if the land lie in Iredell, and the Plaintiff's entry of it in Burke be, for that reason, void, knowledge of it would not affect the Defendant. If he knew of it, he knew also that it was void. For if the entry created no obligation on the State, to perfect the Plaintiff's title by a grant. it could not oblige the Defendant, in conscience, to convey to the Plaintiff the legal title, which the State had conferred on him. The two titles coming through different sets of officers, of whom only one had authority to perform the acts necessary to precede the issuing of the grant, they are as distinct and independent, in reference to this question, as if they had been derived from different persons. The doctrine of notice is therefore inapplicable; and the cause stands upon the intrinsic strength of the respective titles of the parties.

Taking the fact for granted, that the land lies in Burke, it may however be inquired, what equity the Plaintiff has, or how he gives this Court jurisdiction? If it be true, that a grant for land lying in one county, which describes it as lying in another, be void, the plain, direct, and complete remedy of the Plaintiff would seem to be at Law. Both the matter of fact—the location of the land—and the operation of the grant, are properly triable there. The Plaintiff does not stand upon the equitable title of his entry only. He is armed with a grant, appearing to be a legal title; upon which he must recover in an ejectment in Burke, notwithstanding the Defendant's grant in Iredell, if the latter be void. If indeed it was not void, or even if a Court of Law had held upon an ejectment, that being the first patent, it passed the legal title, notwithstanding the falsehood on its face, it would be a different matter. This Court would then inquire into the preferable equity, arising out of the respective entries. But the Plaintiff has not established his own title at Law, so far as it depends upon the actual location of the land, nor obtained the opinion of a Court of Law, upon the legal operation of the Defendant's grant. He comes here for a decision of both these points; though the latter is purely a legal question. His bill is, in truth, simply an ejectment bill, against the tenant in possession, to try the strength of two legal titles; of which he pronounces his adversary's void. Such a bill cannot be entertained.

If, however, the Court could perceive, that the Defendant's legal title was not void, and would at Law defeat the Plaintiff's, his equity would certainly be sustained here, notwithstanding the judgment pronounced by himself upon the Defendant's grant. It is not absolutely necessary to the decision of the present case, that the legal validity of a grant, describing the land to be in a wrong county, should be determined. No conclusive opinion will therefore be given on it. My own impression is, that such a grant is void. I will not say that would be the case with deeds between individuals; for the county is only a part of the description, and might probably be corrected by the more specific description by natural, or other boundaries. Nor do I think a description in a grant must in all respects be consistent. Ordinarily, ambiguities arising upon evidence may be explained in the same manner; and many rules have been laid down for their construction, having respect to the objects called for, and among them, the most conspicuous, permanent and least deceptive. But the county, in which the land lies, seems, under our statutes, to be of the essence of the description in a patent. The State has a right to know what land she grants, and where situate, and that she grants it upon the representations, under oath, of her proper and responsible officers. It is true, that in general, a Court of Law cannot, in a collateral proceeding, look behind the grant, into any irregularity in obtaining it. Its validity must be put directly in issue. But this objection arises on the face of the instrument, and relates to the thing conveyed, in terms, by it. The grant follows, in the description, the plot and survey; of which duplicates are required to be filed in the Secretary's office, and one appended to the grant, as a part of it. This survey can be lawfully made only by the Surveyor of the county in which the land lies; to whom the entry-taker of that county issues a warrant. By the act of 1777 (*Rev. c.* 114) an entry-taker is appointed for each county, with whom "any person may enter a claim for *land lying in such county*." The entry is to be made "in writing, setting forth" (among other things) "the name of the county in which the land is situate." With that entry-taker, *caveats* are to be lodged, and upon his certificate, they are to be tried on the premises by a jury of the same county. It cannot be held, I think, that a grant, purporting to convey lands thus entered and surveyed, according to law, by those appearing to be the proper officers, should convey land, entered with and surveyed by officers who had no authority touching the matter. It is of the substance of a patent, that the land should appear to be situate in some county; and a reference to those provisions of the statute proves, that the true county ought to be stated. If a grant for land in one county would pass land in another, then the entry, upon which that grant is founded, must likewise be held to be good. This would lead to a vagueness, uncertainty and contradiction, in the terms of an entry, which would defeat the whole purpose of requiring any description in the entry; and would entangle titles beyond the ability of man to unravel. The county thus forming a material and essential part of the description in the entry, expressly required by the statute, it must be of the like important consequence in the grant, which is founded on and follows the entry in that respect. It cannot, in general, therefore, be departed from. And if the land, as described by metes and bounds, cannot be found in the county mentioned, the grant must be inefficacious to pass it, by reason of the insufficient and incongruous description. I have laid this down as the general rule. I do not suppose it a universal one. I can readily suppose an exception to it. Perhaps there may be others. If, for instance, an entry were properly made, and a warrant issued, and before its execution and the return of the survey, the name of the county were changed, or the county divided, and then the survey were returned, and followed the entry and warrant, the grant might not be avoided, although the land, at the time of issuing the grant, did not lie in the county therein named. But in that case, the land would form a part of the same identical territory, under whatever name it might be known. In the case before us, that is impossible; for the same spot cannot be at once in two counties. But, without deciding this point, it is a sufficient objection to the present bill that the Plaintiff has made no attempt to have the judgment of a Court of Law upon this legal question. Until he shall have failed there, he has no occasion nor excuse for coming here.

If, however, a Court of Law had so decided, as to make it necessary for the Plaintiff to abandon his legal title, and relying upon his entry alone, to ask the aid of this Court, it would then have to be considered, how his equity stands on that. If the entry be void, it gives him no equity. The same provisions of the act of Assembly and the same reasoning, which have been supposed to render inoperative the grant, apply with equal and greater force to show the entry to be void. In one respect, the entry stands on less advantageous ground than the grant. The latter is, in each case, issued by the same officers—the Governor and Secretary of State. Its defect consists in a description, which is materially false, and cannot be corrected. But the entry is defective, not barely in describing the land as lying in the wrong county, but also in being made with an officer who had no authority to receive it, and surveyed by another equally unauthorized As the entries of the Plaintiff and Defendant are made in different counties, and their calls are for the same county line, *on opposite sides of it*, unless the utmost latitude and vagueness of description be allowed, it seems to be impossible that they can ever come in conflict.—But if in fact the same land has been surveyed under them, the one or the other must be void. Which of them it is, depends upon the question, in which county is the land? That fact is directly put in issue by the answer, in which the Defendant states, that he did "honestly believe" at the time he entered, and at the time of answering—in 1820—that the land was situate in Iredell, and not in Burke. The burden is thrown on the Plaintiff of showing the contrary, and he has had full time to do it. Commonly the limits of a county, being of general interest, are specifically fixed by law, designated in surveys made under public authority, and notorious. Such public documents, or even a reputation, general and undisputed, and acted on by the authorities on both sides of the line, would be *prima facie* competent to establish the line, in a private controversy of the present nature. But the answer states, that the line was never "properly settled;"

and in this particular all the witnesses, on both sides, agree with it. The Court will not say, that its situation might not be proved by witnesses, upon their knowledge acquired by surveys, not made under public authority, nor in the cause. Certainly a survey of one or the other of the latter kind would be most satisfactory. But no survey of any kind appears in the proofs before us. The parties have relied on the opinions of their witnesses; and they are given without any sufficient grounds on which to found them. One witness barely states, that he believes the land to be in Burke. Another states, that from a survey he made, he thinks about one hundred and twenty acres lie in Burke. But we are not told what survey he made, whether of the land or of the county line; if the latter, where he began or went to, nor his reasons for adopting either *terminus*. Such evidence is not sufficient proof of an ordinary line between individuals—much less a public and disputed boundary. But its feeble strength is further impaired by the contrary opinions of the Defendant's witnesses. Five or six of those declare, that before the defendant made his entry, "a rough measurement" was made, to ascertain the line. They all thought the line was in Iredell; and the Defendant then entered. The fact in dispute—the boundary between the two counties—is susceptible of clear proof, and ought not to be established upon less proof. But the plaintiff has not rendered his allegation of it even probable. The Court is therefore obliged to declare, that the land covered by the Defendant's grant does lie, according to the terms of the grant in Iredell county.

The counsel for the plaintiff has asked for an inquiry upon this point. A reference is ordered, to ascertain the mode and extent of the relief, which the particular circumstances may require, after a decree, upon the hearing, establishing the right to some relief. Where a mortgage or a partnership is declared, accounts are ordered. Where an agreement for a sale under a general description is established, the estate may be further identified by a survey But a fact constituting the *gist* of the controversy, and directly put in issue by the pleading, must be proved before publication. It enters into the Plaintiff's title, and must be established on the hearing ; else there is no case upon which to institute an inquiry. It is never referred to the Master, whether a party can supply a deficiency of evidence to make a case. If it were, inquiries would be interminable, and the final decree indefinitely postponed. Inquiries relate to matters, supplementary to the general relief decreed on the hearing. If the Plaintiff had proved, that some of the land certainly lay in Barke, but it did not appear what part in particular, and it was deemed necessary to the clearness and precision of the decree, that such part should be designated by the particular metes, bounds, and quantity, a survey would be ordered, to establish those facts. But here, no part of the land is shown to be so situated. The Plaintiff has therefore failed to prove the case stated in his bill; and the Court cannot supply the deficiency, but must dismiss the bill.

PER CURIAM.—Declare, that the land granted to the Defendant is not proved to lie in Burke County, and is therefore held and deemed to lie in Iredell County. Declare further, that if the land did lie in Burke County, the Plaintiff would be without any matter of equity, upon which to ask the aid of this Court, since he hath obtained a grant from the State, for the land claimed by him, and may for anything appearing to the contrary, have a direct, speedy, and complete remedy at Law, and therefore decree that the bill be dismissed with costs.

James C. Jones
v.
Marmaduke Jeffreys & William Boylan.
} From Franklin.

Where a Plaintiff seeks, to enforce an Equity against Law, he can have no relief unless the person who has the legal title be a party to the suit.

The Plaintiff alleged that a tract of land, held in common by a number of persons, was, under an order of the Court of Equity for the County of Franklin, sold by the Clerk and Master, for the purpose of dividing the proceeds among the tenants, instead of making a partition thereof—That at the sale, he, and the Defendant, *Jeffreys*, purchased it, and executed their joint bonds to secure the purchase-money; that the sale was, upon the report of the Master, confirmed, but that no deed had ever been executed to either the Plaintiff or Defendant, *Jeffreys*; that *Jeffreys* had become insolvent, and that the Plaintiff had been forced to pay the whole amount for the purchase-money. The Plaintiff then charged, that the Defendant, *Boylan*, had purchased of the Defendant, *Jeffreys*, with notice of the Plaintiff's Equity, and he sought to subject the land in the hands of the Defendant, *Boylan*, to the payment of one half the purchase-money.

Seawell, *Badger*, and *W. H. Haywood*, for the Plaintiff.

Cameron, for the Defendant.

HALL, Judge.—Upon looking into the bill in this case, it appears, that the petitioners who filed the petition in the County Court of Franklin, for the sale of the land in question, and in whom the title to the land is stated to be, and the Clerk and Master who sold the said land, are not made party Defendants to the bill. So that the Court, in case the allegations in the bill were fully proved, could not make a final decree in the case for want of parties.

PER CURIAM.—Let the bill be dismissed with costs.

Henry Stevens, Ex'r. of
Letitia Gardner,
v.
Horace Ely,
} From Beaufort.

Slaves can only be held as property; and conveyances, having for their object either their emancipation or a qualified state of slavery, are against public policy, and a trust results for the donor or his executor.

As where slaves were conveyed in trust to permit them to live together, and be industriously employed, and that the donee should exercise a control over their morals, and furnish them with necessaries—it was *held*, upon the face of the deed (HALL, Judge, *dissentiente*) that as the slaves were not considered the property of the donee, a trust resulted to the executor of the donor, and a conveyance of the legal title was directed to be made to him.

Per HENDERSON, Chief-Justice, *arguendo*. Where the legal estate passes, trusts annexed to it, which are either illegal or impolitic, are avoided, and a trust declared for the donor, or the donee declared to hold discharged of any trust, as will best tend to suppress the illegal purpose.

Also, *per* HENDERSON, Chief-Justice, *arguendo*. In a will, estates are created by the intent of the devisor, however expressed; but to the creation of the same estate by a deed, certain technical words are necessary. But when the estates are created, whether by deed or will, they possess similar qualities; and the same circumstances will in one case cause a trust to result for the heir, and in the other for the grantor.

The cases of *Haywood* v. *Craven* (1 *Law Rep.* 557) and of *Huckaby* v. *Jones* (2 *Hawks*, 120) approved.

The Plaintiff alleged, that his testatrix, intending to emancipate her slaves, consisting of a woman and her children, conveyed them to the Defendant, in consideration of £5, "in "trust, that the said *Ely*, his heirs, &c., shall, from time to "time, permit the said negroes and their increase, to live "together, upon his, the said *Ely*'s land, and to be industriously employed, and continue to exercise a controlling "power over their moral condition, and to furnish said "negroes with the necessaries and comforts of life." That by an endorsement on the deed, it was agreed, that Plaintiff's testatrix should have the use of the said slaves from year to year, during her life, in consideration of which, she covenanted to pay the Defendant one shilling for each year; that his testatrix, by her will, bequeathed the negroes to her sister, and that directly after her death, the Defendant took them into his possession.

The Plaintiff averred, that this deed was executed with an intent to procure the emancipation of the slaves, and that being against the policy of the law, a trust resulted for his testatrix The bill prayed for a re-conveyance of the slaves, and for an account of the profits received by the Defendant.

The Defendant, in his answer, denied that there was any trust between him and the Plaintiff's testatrix, to procure the emancipation of the slaves conveyed to him; or that he had agreed to hold them in any way but that mentioned in the deed, and insisted, that the deed was executed by the testatrix, from a wish to do him, the Defendant, a favor.

Replication was taken to the answer, and witnesses examined. Among them, the Register, *Mr. Ellison*, swore, that when the Defendant came to have the deed registered, he observed, that the old lady had conveyed the negroes to him, for the purpose of having them emancipated.

A copy of the will of the Plaintiff's testatrix was by him filed, as an exhibit in the cause.

His Honor, Judge NORWOOD, on the Spring Circuit of the year 1829, declared that the Defendant held the slaves as a bare trustee; that the trust was one contrary to the policy of the law, and resulted for the benefit of the Plaintiff, and decreed a re-conveyance by the Defendant, upon having the consideration money refunded to him, and directed an account of the rents and profits.—From which the Defendant appealed.

The case was argued at December term, 1829, by *Badger & Devereux*, for the Defendant, and by *Gaston*, for the Plaintiff; and at the last term, by the same gentlemen for the Plaintiff, and by *Hogg*, for the Defendant. For the Defendant were cited, *Curtis* v. *Perry*, (6 *Vesey*, 736,) *Cecil* v. *Butcher*, (2 *Jac. & Walk.* 565,) *Brackenbury* v. *Brackenbury*, (*ditto* 390.)

For the Plaintiff, *Cruise Dig. Trust. c.* 1, *s.* 2. 7. & 28. 2 *Thom. Coke Lit.* 102, *note*, *Robinson* v. *Taylor*, (2 *Bro. C. R.* 594,) 2 *Fonb* 117. *Birch* v. *Blagrave*, (*Amb.* 264.) *Ward* v. *Lant*, (*Pre. Ch.* 182.) *Cottington* v. *Fletcher*, (2 *Atk.* 155.)

Henderson, Chief Justice.—Were this donation by will, and the object to emancipate, the case of *Haywood* v. *Craven*, (2 *Law. Rep.* 557,) is an authority to show, that a trust results to the heir at law, and next of kin If the object be to hold the negroes, not as property, but in a qualified state of bondage, the case of *Huckaby* v. *Jones*, (2 *Hawks*, 120.) shows that a trust also results.—It is unimportant, therefore, to inquire whether the object of the parties was, that the Defendant should emancipate the slaves; or that he should continue to hold them in the manner pointed out in the deed.

His Honor then stated the declaration of trust as above, and proceeded as follows: These trusts exclude the idea that he should hold the negroes as property. And the policy of the law forbids, that they should be held otherwise. The trust therefore falls off, and the Defendant holds them as property freed from the trust; or the beneficial interest results to the grantor; or rather, never was out of her. I shall not examine the cases which were cited and commented on at the bar, They all go to prove, that unlawful trusts, motives or intents render the grant void or not, as will best tend to suppress the illegal act, or intent contemplated. Or if they do not render the grant void, they either fall off or result, as will best effect the same object. And here it is observable, that there is no base design, on the part of the maker, to do an immoral act, to cheat or defraud another. The act is forbidden only by the stern policy of the State, necessary to support our institutions in regard to slaves; but there is nothing *malum in se* in the act. Nor did she attempt to conceal or disguise her object, but placed it in her deed, to be put on the public records. There is nothing, therefore, which forbids this Court to give to her her legal rights. We cannot say that her hands are unclean; and therefore we will not aid her, or give her that which in strict right she may be entitled to. For sensitive as we are and ought to be, as to whatever may interfere with our laws on the question of slaves, and however severely we may punish, and ought to punish those who, in the most remote manner, attempt to weaken the bonds by which we hold them, yet these sensibilities are not roused, or acted on against a single female, who from feelings of kindness towards her three or four slaves, or from feelings of conscience, endeavors to better their condition, who has acted openly, and who from the publicity which she has given to her act, did not intend to offend against the law; it is sufficient for her to feel the direct effects of her unlawful act, without also subjecting her to its indirect effects. This consideration frees this case at once from the operation of those cases, where a fraudulent or dishonest grantor comes into this Court to annul his deed. Against her merits the Defendant has none. He is a mere volunteer, and now attempts to hold the negroes as slaves, in fraud of his agreement with her. Sound policy, perhaps, would require that the slaves should be forfeited. But we have no authority to make, only to declare the law.

Had this case arisen on a will, there would not have been even an argument attempted to disprove a resulting trust. But being in a deed, it is said, that no such trust arises. And the reason assigned for this difference is, that in a will the intent alone is regarded, which shall be executed; but not so in a deed. Is this rule applicable to the present case? It is true, that certain technical words are required by law to express certain intents in a deed; the word *heirs*, to denote that perpetuity necessary to give a fee-simple: the words *heirs of the body*, to create an estate tail. But in a will, no particular words are necessary to denote an intent; any significant words will do. But when the intent is thus fixed and ascertained, the thing created possesses the same qualities, whether created by the technical words required in a deed, or the significant words required in a will. A fee-simple is a fee simple, and nothing more or less, whether created by deed or will; and the law will not permit an illegal estate to be created by either. Nor can an estate, which would be illegal, if created by deed, be legal because created by will. Neither can qualities be given to it by one, which it is unlawful to give to it by the other, or which the other cannot give. That a different rule prevails in arriving at the intent, that a word would create a thing in the one, which it would not in the other, is admitted. But this is a rule in regard to the construction of the instrument. There can be no reason for raising a resulting trust for the heir, which does not equally operate to raise one for the grantor. It is said, that the heir takes all that the ancestor does not devise to another. The grantor retains all that he has not given away; and if the grantee cannot take the beneficial interest, it remains in the grantor. For to every grant there must be a grantee—a taker. It is said, that the grantor had forfeited her estate, by attempting an illegal trust. So has the devisor, and his heir takes nothing but what his ancestor had at his death. It is said, the forfeiture is inflicted on him, to prevent the commission of such acts. Our own feelings, nay, our holy religion tells us, that we are more restrained by punishment to be inflicted on our children for our crimes, than on ourselves. So that policy is on the other side. I cannot therefore distinguish this case from a similar disposition made in a will.

Ruffin, Judge, concurred.

Hall, Judge, *dissentiente.*—This case differs from ordinary sales in this: the vendee is "required, from time to time, to permit the said negroes and their increase to live together upon his land, and to be industriously employed, and to continue to exercise a controlling power over their moral conduct, and to furnish said negroes with the necessaries and comforts of life." And the question is, whether this stipulation, request or confidence, renders the bill of sale void, and the Defendant a trustee, so as to be compelled to reconvey the slaves mentioned in the bill of sale, to the Plaintiff. The question is the same, as if the Plaintiff's testatrix were still alive, and sought for a reconveyance. If she could not succeed, so neither can he.

It is proper to view the case as it really is, and to consider that no other trust is created in the vendee, than that which is expressed in the bill of sale. In that trust, I see nothing illegal or immoral. It is a trust, request, or confidence, reposed in the vendee—a confidence not controllable, or intended to be controlled by any judicial tribunal. The legal title to the slaves passed for a price, far below their value. But the vendor stipulated for their good treatment, and reserved the use of them to herself for life.

Therefore, considering the bill of sale to mean nothing more than it expresses, I am obliged to say that the Defendant cannot be deprived of the property in the slaves.

But it is attempted to prove that the bill of sale was made for the purpose of having the slaves, therein conveyed, emancipated; and the will of the vendor is produced, as in part evidence of it. I think it is unnecessary to notice the contents of the will, because certainly it is not evidence against the Defendant. It was made after the date of the bill of sale, and contains the declarations of the vendor herself.

The testimony of *William Ellison* has been taken. He says he heard the Defendant say, that the slaves conveyed in the bill of sale by *Letty Gardener* were to be emancipated after her death. This evidence cannot be received, to raise a trust upon the bill of sale, where none such is expressed; although it might be received for the purpose of proving a fraud in the Defendant, in procuring the bill of sale to be executed upon such secret trust. But I think it insufficient for that purpose, contradicted, as it is, by the Defendant's answer.

Supposing at the date of the bill of sale, it was the desire of the vendor, that her slaves should be liberated at her death, but she considered that to be a forlorn hope, as being against the laws of the country; and that she concluded, as the next best thing she could do, to convey them to the Defendant in the manner which she has adopted. She certainly had a right to do so. It might have been more prudent in her to insert a power of revocation in the bill of sale. But her omitting to do so cannot affect the question before the Court.

Viewing the Defendant as the owner of the slaves, if he deviates from those duties which the law requires a master to observe, as by letting them hire their own time, he is answerable for such misconduct, as any other master is.

PER CURIAM.—Let the decree of the Court below be affirmed.

Sarah Green
v.
Wm. Branton & Eliz. Branton, } From Pitt.

New matter, brought forward in the answer as a defence, which would have aided the Plaintiff, had the bill been framed with reference to it, cannot be used to sustain the relief sought.

A married woman can be bound as to her land, there being no separate estate, only by her deed executed in the prescribed form, or the decree or judgment of a Court, and if her deed be informal, it cannot be aided.

Where the husband, with the wife's privity and consent, sold her land, and she received and enjoyed the purchase-money, upon her bill to be relieved against an obstacle to her, in asserting her right to the same land, her fraudulent conduct does not bar her—and an outstanding legal estate, which otherwise she had a right to have removed, will not be held up as a security for the purchase-money

A wife is in all cases barred by a judgment against her husband and herself, obtained during the coverture, unless obtained by a combination between the other party and the husband, in fraud of the wife's rights—and if the husband, for his own convenience, declines to defend the suit, the wife cannot have the judgment reversed, simply because it was unjust.

As where the husband and wife were served with a *sci. fa.* to subject her land to her father's debt, and the husband, without collusion with the Plaintiff, or the administrator, declined defending her interest—it was *held*, that the wife was barred by the judgment.

The bill charged, that the Plaintiff's father, *Samuel Branton*, died in 1800, leaving four children, *William*, *Samuel*, *Elizabeth*, then intermarried with *Matthias Holstein*, of Pennsylvania, and the Plaintiff, then intermarried with *George Green*: That the father died seised in fee of the land in dispute, and intestate: That his two sons administered, and received personal assets more than sufficient to pay all his debts; which consisted in part, of a debt to one *Standley* of £31 : 1, and of a debt to one *Curl*, of £24 : 2 : That the two sons fraudulently bought in all the personal property under *Standley's* execution, so that there was nothing left to satisfy *Curl*, who sued on his bond and got judgment, though the plea of fully administered was found for the administrators, in consequence of their fraudulent combination: That a *scire facias* issued against the heirs, and a judgment was taken against the lands in their hands, on which they were sold, and the two sons became the purchasers at a very inadequate price: That there were in fact personal assets sufficient to pay that debt, but that the sons refused to pay it, with a view of buying the land, and defrauding their sisters of their shares: And that to effect this purpose, they combined together, and with *George Green*, the Plaintiff's then husband, not to make defence to the *sci. fa.*, and for that purpose, they gave *Green* $400, in consideration of which, he did not defend the Plaintiff's interest against *Curl's scire facias.*

The bill then charged, that *Green* was dead; that *Holstein* and wife had conveyed to the Plaintiff; that *Samuel*, the younger, was also dead, and that his part of the land had descended to his daughter *Elizabeth;* who, and her uncle *William*, were Defendants. The prayer was for a conveyance of one half of the land of which *Samuel Branton* senior died seised.

The answers denied personal estate of the father to the value of *Standley's* debt, and set up a title by deeds made by the father to his two sons just before his death, and averred, that the sons were advised by Counsel, that those conveyances being voluntary, would not protect the land from creditors; and that apprehending an unjust demand for a large sum would be brought against their father by one *Stringer*, they determined not to pay *Curl's* debt, but suffer the land to be sold for it, and purchase it in, and thus perfect their title; that the sale was regular, and that the sons bought fairly. All collusion with *George Green* was denied; but it was admitted, that he complained that the father had given all his land to his sons, and that to satisfy him for his disappointment, they gave him $400; but the period of that contract was not stated. The Defendants relied upon the opportunity of defence to the *scire facias*, and insisted on their title under the execution sale.

Replication was made to the answers, and proof taken; but a statement of it, and copies of the deeds are not material to the point decided by the Court.

Gaston, for the Plaintiff.

Hogg, for the Defendants.

RUFFIN, Judge, after stating the case, proceeded: The deeds made by the father are among the exhibits, and are so defectively drawn as to be wholly inoperative. Besides that, the depositions show, that those deeds were obtained from the old man *in extremis*, and under circumstances which completely invalidate them. It was a gross and unfeeling imposition on the father's weakness. They are not the shadow of a title for the Defendants; but constitute cogent evidence against them. Had the bill been differently framed, those deeds might have furnished a specific ground of relief. If they had been held up by the sons as a title; if that pretence induced *George Green* not to defend the *sci. fa.* upon the idea that his wife and he had no interest, or even led him, in doubt of that interest, to compromise or receive a sum of money, in ignorance of the facts attending their execution, it would be a fraud on him, as well as his wife, which Equity would remove out of their way. But the bill brings forward no such equity. The deeds are not even mentioned in it. The first we hear of them is in the answer. They were not registered until 1819, after this suit was begun. They do not seem, if known to *Green* and wife, to have been acted on by them, or to have influenced their conduct in the least. It is impossible for the Court to proceed on a ground not taken in the bill, or to relieve an equity not raised by the party. We cannot say those deeds had the least influence on the Plaintiff's conduct, or her husband's, when she is altogether silent on that head.

The evidence proves, very satisfactorily, the payment of the sum of $400 to *Green.* Both the bill and the answer leave the time at large. But the depositions prove, that the contract was made, and the payments, after *Curl's* judgment, and the purchase of the land by the brothers. It is clear, too, that the whole was with the knowledge and consent of the Plaintiff. She, in fact, made the bargain ; and the payment was in provisions for the family. The Defendant's counsel has endeavored to stand on this arrangement of the wife's, and construes her present suit into a fraud, which shall bar all relief, or make the land a security, at least, for the money advanced.

The contracts of a married woman, except as to her *separate* property, are held, alike in Equity, as at Law, to be void. She can be bound as to her land in only two ways : by her deed duly executed by her privy examination, or by the judgment or decree of a Court. Her deed is a formed legal conveyance; in favor or against which there is no equity. It stands upon its strength in Law. If it is not perfect, we cannot help it here. An agreement, no matter upon what consideration, by a married woman, is an absolute nullity in every Court. We do not take notice, therefore, of any participation on her part in the family arrangement. Nor can the Court allow her husband to treat for the sale of her land, and contrive a conveyance of it without her assent, obtained according to the act of Assembly, under the pretence of a judgment and judicial sale.

We do not lay down the rule, that the husband is bound to pay the debts of his wife's land ; that he is legally bound to advance money out of his own pocket, to discharge debts of his wife's ancestor. He may suffer the land to be sold. But a Court cannot hold out temptations to him to betray his wife's interests, and commit a breach of his marital duties. If he will not move to save his wife's freehold, we cannot help it. But he must not be kept back by another, and for the sake of mutual gain. He shall not look out for gain at his wife's expense; and he who prompts him to it, shall not profit by it. It is taken to be clear, that if the husband and brothers combined to defeat the wife, it is a fraud upon her, and everything done under it must be set aside. But the mere negligence of the husband is the wife's misfortune, not the fault of others. Married women are bound by judgments at Law, as much as other persons, with the single exception of judgments allowed by the fraud of the husband, in combination with another. It cannot be said, that when a woman becomes *discovert*, the ground of judgment during coverture must be re-proved by the creditor, or even that the judgment must be set aside, if she can show that it ought not to have been recovered. That is not the kind of fraud that will avoid it. Something else must appear, besides the judgment being unjust. That was a thing that might have been shown on the trial at Law; and therefore cannot, by itself, be heard now. She must charge and prove, that she was prevented from a fair trial at Law, by collusion between her adversary and her husband, preceding or at the trial. Here there is no evidence to that effect. The husband was served with process, and never stirred in the business. But not the slightest communication between any of the parties is spoken of, until after the sale under execution. Then, a witness says, the Plaintiff and her husband expressed their sense of the wrong done them; and then the brothers agreed to make compensation. It is true, the Plaintiff afterwards urged her husband to sue, and he refused; saying, that she had got the worth of her land, and ought to be content. But that is nothing; for what could he do then? In fine, the only equity which a married woman has against a judgment, which other people have not, is, that she has been deprived of full defence by the contrivance of her adversary. This cannot be the case without the fraudulent collusion of the husband. This is not shown by the mere inaction of the husband, or even that and a just defence. There must be a dealing on the part of the adversary also. Else he is not to blame, and will not be made to suffer the consequences of her making a bad choice of her husband. It is precisely like the husband letting the statute of limitations run against the wife. It binds her.

The evidence is far from establishing, satisfactorily, that there were personal assets; and the debt of *Curl* is admitted in the bill. If, however, the other parts of the case were made out, an account of the assets would be ordered. The want of them would be conclusive against the bill. Their sufficiency would be material only on the question of collusion; but to that point they would be very important, as a circumstance. But that is not one of itself sufficient. I repeat, there must be a combination not to defend. Otherwise, the wife cannot open the case, and carry it back, to have it re-tried at law. I think it very probable, (though there is no allegation or proof, even to that,) that *Green* withheld a defence to *Curl's* debt upon the same motive, which induced the sons to desire a judgment on it, namely, from apprehension of the large unjust debt of *Stringer*. But suppose that; and the Plaintiff is then to be looked on, rather as a party to *that* fraud, than the object or victim of it. It was not directed against her, but the creditor, and is good as against the parties and all else but creditors. The purpose was not to take the land from the Plaintiff, and vest it in the brothers, but to defeat *Stringer*. But even that is not the case before us; which is one altogether without collusion, as relates to the Plaintiff's husband; and without a communication of any sort, or at any time as to *Holstein*.

Hall, Judge.—It appears in this case, from the evidence, that a legal title to the land became vested in *William* and *Samuel Branton*, the brothers of the Plaintiff, as stated in the bill; that the process by which it was sold, as far as relates to the Plaintiff, was regular and legal. There does not appear to have been any fraud, collusion, or combination, to defraud the Plaintiff by the Defendants and the husband of the Plaintiff, who had it in his power to defend her interest. If there were assets to discharge the debts of the intestate, there was ample opportunity to do so, on the return of the *scire facias*, on which judgment was obtained for the sale of the land.

PER CURIAM.—Let the bill be dismissed with costs

Simon Jeffreys
v.
Charles Yarborough et al. } From Franklin

Where a decree was made for the payment of money against an administrator, and it was ascertained by the decree that he had no assets—*held*, HENDERSON, Chief-Justice, *dissentiente*, that a *sci. fa.* under the act of 1784 (*Rev. C.* 226) is confined to judgments at Law, and that the only remedy for the Plaintiff was by a bill against the heirs, to have satisfaction out of the real assets.

This was a SCIRE FACIAS issuing from this Court. The case made by it, and the decree upon which it was founded, was, that *Charles Yarborough* made his will, and bequeathed a legacy to the Plaintiff, and appointed *James Yarborough* his executor, who received the assets, wasted them and died; that *James* also made his will, and appointed *Henry Yarborough* his executor, and left a considerable personal estate, which came to the hands of *Henry*, who wasted it and died; that *Thomas Yarborough* was the administrator of *Henry*, and had assets only to the value of $74 14; and that *David M. Lewis* was the administrator *de bonis non* of *James*, and had no assets. Upon a bill against all these parties, the accounts of the several estates, and of the Plaintiff's legacy, were taken and confirmed, and a decree made, declaring what was due to the Plaintiff, and that there were no assets in the hands of *Thomas Yarborough* and *Lewis.* The Plaintiff sought satisfaction out of the real estate of *Henry* and *James Yarborough;* and to obtain it, issued the present *scire facias* against their respective heirs and devisees.

Ruffin, Judge, after stating the case as above, proceeded: I conceive that the Plaintiff cannot proceed in this manner. That Equity will subject the lands to the ancestor's debts is perfectly clear. It is one of its oldest jurisdictions to grant discovery, and take accounts of the real estate. It does it as ancillary to Courts of Law, for the satisfaction of mere legal demands. Much more will it do so when the debt, due by its own decree, is entitled to satisfaction out of the lands, as is the case with all debts in this State. But when a person resorts to a Court of Equity for relief, he must adopt the mode of proceeding known to that Court. The regular course of this Court is to proceed upon English bill, and the answer, or plea of the Defendant, upon oath. The *sci. fa.* is a process unknown to it, as a Court of Equity, unless in a few cases provided for by statute. It is a strictly common law writ. Our act of Assembly gives it in the case of the death of a party in Equity, instead of the bill of revivor. But it can be used only to revive. If any new matter is to be put in issue, or becomes material to the just decision of the cause, it must be introduced by bill, in the nature of a bill of revivor and supplemental bill.

It would be impossible for this Court to administer its justice in this method. Why shall the attempt be made? It is said, because it is more simple and expeditious. I think quite the contrary. The pleadings in Equity are much less technical than at Common Law, and leave a cause more open for a decision upon its merits. The expedition will only exist in cases not disputed. But we have a right to expect cases of real litigation, in which the heirs will deny the full administration, or insolvency of the executor: others, as here, where there is a primary and a secondary liability. How are these questions to be tried? If under this process, by a jury. We know that one of the most expensive, difficult and dangerous proceedings at Law, is the trial of the issue of *plene administravit*. Often the parties have to come into this Court for assistance by way of discovery, before trial at law, or relief from the injustice done by the verdict on that issue. The witnesses must all be present at once before the jury. Every voucher must be *then* proved by a disinterested witness; and the parties cannot be called on for admissions. These reasons have raised the jurisdiction here; because accounts can be taken more correctly, at less expense, and more speedily. Should we proceed upon *sci. fa.* until the jury had found a verdict, and then entertain a bill to correct our own injustice, as we do that of a Court of Law. At law, judgments are always direct and immediate, although as between some of the parties liable, there may be, in Equity, an immediate and more remote liability. In pursuing this legal method, should we not be obliged to adopt the legal measure of justice? Now it is plainly inequitable, that the heirs of *James* should pay the Plaintiff, unless they be able to get satisfaction from the heirs of *Henry*; because the latter received the assets of the former. Yet at Law, there is no such thing as successive liability. A judgment is always direct. If we are to retain our own rule of decision, why not our own method of arriving at it, since it has the sanction of ages, is thoroughly settled, and well understood. I will mention several other inconveniences of a change. It is the rule of this Court, that each party pays his own witnesses, without regard to the event of the cause. This would be ruinous in practice, upon a collateral issue between the heir and executor. It is another rule of this Court, that no suitor shall be concluded by one hearing; but that by petition or bill of review, every material point of the decree may be reconsidered, and solemnly decided twice. The introduction of the jury trial abrogates this part of the course of the Court, as applied to this class of controversies; and as the case is not on paper, many of the most intricate questions, both of law and fact, must go off as at *nisi prius*, where the case is given to the jury *viva voce;* or be re-examined at the expense of a new trial, as at law. The extreme difficulty of doing justice, in a trial at Law of such cases, pressed itself on the attention of the Legislature so strongly, as to produce the passage of an act, authorizing Courts of Law to refer, as to a Master, matters of account of this kind. I allude to suits on the bonds of guardians and administrators. Surely then, this Court, when it may safely act in its ancient and accustomed mode, ought not to yield up its distinguishing characteristic, which constitutes its real value to the country; and adopt that of the Common Law, the inadequacy of which to the ends of justice created this jurisdiction, and contiuues its existence.

I have supposed that the facts put in issue upon this legal writ are to be tried by a jury. If this be not so, but the defences are to be made and the facts ascertained, according to the course of this Court, by plea and answer on oath, and reference to the Master, then plainly there is no saving of time or expense, or any change but that of substituting a *sci. fa.* for a bill, as the means of instituting the suit against the heir. Why do that? What advantageth it? I object to a change that is to do no good, unless required by a law. I object to it also, because it is an indirect method of giving this Court original jurisdiction, not contemplated by the Legislature. I admit we must do it, if the Legislature so enacts. It is to be hoped it never will. I think it never has.—The act of 1784 (*Rev. c.* 226) is expressly confined to "suits at law;" and the defences are all legal, and to be tried according to the course of the common law. The act of 1807 (*Rev. c.* 716,) is plainly *in pari materia*, and confined also to suits at Law. And the express declaration in the last section is, that the provisions in that act shall not affect the *remedy*, which any creditor has *in Equity* against the real estate of a deceased debtor, or in any manner change *rules of decision in Equity* in any such case. The second section of the act of 1787, (*Rev. c.* 278,) has been urged as giving this remedy. After reciting that the mode of carrying into effect decrees in Chancery was by process *in personam*, it enacts that upon decrees for sums of money, the party may issue execution against the Defendant's body or estate, and that the estate shall be bound in the same manner, as it is by judgment and executions at Law. I take this to mean simply, that there shall be execution in Equity, and to declare its *lien*—what shall be bound and sold under it. But it does not profess to prescribe a method, by which the decree may originally be had; nor by which, after obtaining it against one person, you may execute it against another. But if there were a doubt upon this, it is removed by the cautious proviso of the subsequent act of 1807.

I am confident that the justice of this Court can only be administered by adhering to the mode of proceeding which is peculiar to it: and I must oppose as strenuously innovations upon it, as upon that of the common law. Each is best in its appropriate sphere. I think this writ must be quashed; and the Plaintiff put to his bill.

HENDERSON, Chief Justice, *dissentiente*.—I do not concur in the opinion, that the *scire facias* should be quashed. And the process of reasoning, by which I arrive at the opposite conclusion, is very simple, and to me very conclusive. But I say this with great deference. By the act of 1784, (*Rev. c.* 226) after reciting that doubts were entertained, whether the real estate of deceased debtors, in the hands of their heirs or devisees, should be subject to the payment of debts upon judgments, against the executors or administrators, in order to remove such doubts, it was enacted (in the second section) that in all suits *at Law*, wherein the executors or administrators of any deceased person shall plead *fully administered—no assets*, or not sufficient assets to satisfy the Plaintiff's demand, and such plea shall be found in favor of the Defendant, the Plaintiff may proceed to ascertain the demand, and sign judgment. But before taking out execution against the real estate of the deceased debtor, a writ or writs of *scire facias* shall issue, summoning the respective heirs and devisees of such deceased debtor, to show cause why execution should not issue against the real estate of such deceased debtor, for the amount of such judgment. And if judgment shall pass against the heirs or devisees, execution shall and may issue against the real estate of such debtor, in the hands of such heirs and devisees. The third and fourth sections are on subjects foreign to this point. The fifth section gives the heir or devisee the right of contesting the plea of fully administered, though found for the executor or administrator, on the trial between the creditor and executor or administrator; and points out the manner of making up the issue, and the course to be pursued if *found* for the heir or devisee. Another act, that of 1807, (*Rev. c.* 716,) points out what is to be done, when there are really no assets, and an insolvent executor or administrator omits or refuses to plead fully administered.

It is to be observed, that in this act, the personal representative is to contest the creditor's right of recovery. When that right had been settled in contest between him and the creditor, and in favor of the creditor, that question is put to rest as to all persons, whether heirs or devisees, who have the dead man's land (saving, I presume, recoveries effected by a fraudulent combination between the creditor and executor or administrator.) The only question to be tried and investigated, when the heir or devisee is called on, is that of the administration of the personal assets. For although the heir or devisee is bound, as to the question, debt or no debt, and all other questions arising in the cause, the Legislature did not conclude them as to that point, but permitted them to contest it with the executor or administrator, as a cause, not why judgment should not be rendered against them *for the debt*, but why execution should not issue, *not against them*, but against the lands and tenements of the deceased debtor in their hands. The debt, except in cases of fraud, is conclusively fixed on the estate, by the trial between the creditor and executor or administrator. The heirs' or devisees' only defence is, not against a judgment against them, for none is prayed; nor against an execution against them, for none is prayed: I say, their only defence against an execution to sell the land in their hands is, that there is, or was a sufficiency of personal estate to satisfy the debt. It is admitted that this act did not give a *sci. fa.* upon a decree in the Court of Equity; its words are confined to judgments at Law. At this time, Courts of Equity enforced their decrees by other process, and could not issue either a *fieri facias*, or *capias ad satisfaciendum*. But the Courts of Equity were authorized and directed to issue these writs by a subsequent act. By the act of 1787, (*Rev. c.* 278, *s.* 2,) it was declared, that the mode of proceeding then used to carry into effect the decrees of a Court of Equity, by attachments, *habeas corpus* attachment with proclamations, and commissions of rebellion, are in many cases dilatory, oppressive and inadequate, and it was enacted, that in all cases, where decrees might have been made in any suit in Equity, in any of the Courts of this State, or should hereafter be made, for any sum or sums of money, it should be lawful for execution to issue against the Defendant's body, or against his goods and chattels, *lands and tenements*, to satisfy such decree and costs (and the goods and chattels, lands and tenements, shall be bound by such decree and execution, in the same manner as goods and chattels, lands and tenements, are bound by judgments and executions at Law) *in the same manner as executions shall issue in the Courts of Law.* This act gives the same execution on decrees to pay money, as are given at Law. If so, execution shall issue against the lands and tenements of the deceased debtor; for it did so at Law. But a *scire facias* shall first issue to the heirs or devisees, to show cause why such execution shall not issue. Without this exposition of this act, the same remedy is not given to enforce decrees in Equity, as is given to enforce judgments at Law. The lands of the debtor were liable, by an old statute passed in the reign of *George II.* Our Court Law enforced the same right. It gave the *fieri facias* against lands and tenements. The act of 1784 declares it to be doubtful, whether execution should issue against the lands and tenements of deceased debtors in the hands of the heirs or devisees, and that in certain cases it shall, and directs that a *scire facias* shall first issue to the heirs or devisees, and points out what grounds they may take to protect the lands in their hands from the execution, on the judgment against the executor or administrator. The act of 1787 gave such execution on decrees of the Court of Equity for money, against the goods and chattels, lands and tenements of the debtor, as was given by law; that is, by prior acts. The act of *George II.* and our act of 1777, (*Rev. c.* 115,) gave it against the lands of the debtor, and the act of 1784 cleared away the doubt, whether execution should issue against the lands, in the hands of the heirs or devisees, in certain cases, but prescribes that a notice or *scire facias* shall first issue to them, to show cause against it. If the act of 1787 only extended the act of *Geo. II.* and the act of 1777, as to Equity decrees, then the same doubt would exist which existed prior to the act of 1784, and we would have now to debate, whether lands in the hands of the heir or devisee could be sold under a decree against the executor or administrator. I think no such doubt exists. The execution against the lands is given upon a decree, as it is at Law, explained as it is by the act of 1784. I enter not into the discussion, which is the easiest and most convenient mode, by bill or by *scire facias*. That rests with the present Plaintiffs. And as to a bill being more congenial to Equity rules and Equity practice, that was a question for the Legislature. But I confess I agree both with the Plaintiffs and the Legislature, that a *scire facias* is the most easy and convenient. The only question which can arise in the *scire facias*, viz., the administration of the personal assets, does not require the modes prescribed in the Court of Chancery, by English bill. As to the questions of prior and posterior liabilities, that is settled by the decree. When they arise, it will be more proper to examine into it. But the creditor, having obtained his decree against the executor of his debtor, asks for an execution against his debtor's land, and calls on the heirs and devisees to show cause, if any they have, why he should not have it. As to the argument, that this Court is better qualified to examine the administration of the personal assets, than a Court of Law, if that fact is put in issue, we will examine the fact our own way. If a bill was brought to carry the decree into execution; if that be the only way, and resorted to from necessity, and not from choice, I suppose, since the act of 1787, no defence could be made, except that given by the act of 1784, to the heirs and devisees on the *scire facias*. If the bill be not the only remedy, but resorted to through choice, Equity might say you have no merits, from some cause peculiar to the Plaintiffs, and refuse to move.

In addition to all this, I believe, the practice since 1787 has been to proceed, in similar cases, by *scire facias.*

The argument, when summed up, is this :—The act of *Geo. II.* and our act of 1777 gave the *fi. fa.* against the lands of the debtor in his own hands. The act of 1784 gave the *fi. fa.* against the lands of a deceased debtor in the hands of his heir or devisee, upon a judgment against his executor or administrator, in certain cases; but prescribed a *scire facias* against the heirs and devisees. When these acts were passed, no process to sell property, or against property, issued to satisfy decrees in the Court of Equity. The process was *in personam.* The act of 1787 declares, that where there shall be any decree for money in a Court of Equity, that *execution may issue thereon against the Defendant's body, or against his goods and chattels, lands and tenements, to satisfy such decree, in the same manner as executions shall or may issue in the Courts of Law.*

It follows, that as by the statutes of *Geo. II.* and of 1777, execution might issue against the lands of the debtor in his own hands, to satisfy a judgment at Law, so an execution might issue against the lands of the debtor in his own hands, to satisfy a decree in the Court of Equity. For by the act of 1787, execution shall issue, in the same manner as in the Courts of Law. And as by the act of 1784, execution may issue against the lands of the deceased debtor in the hands of the heir or devisee, to satisfy a judgment obtained against an executor or administrator in certain cases, so in like cases an execution may issue against the lands of the deceased debtor, in the hands of his heir or devisee, to satisfy a decree of a Court of Equity, against the executor or administrator. For, as was said before, the act of 1787 declares, that execution may issue thereon (decrees in a Court of Equity) against the Defendant's lands to satisfy such decree, in the same manner as such executions may issue in the Courts of Law. The act of 1784 prescribes the *sci fa.*

to the heirs and devisees, upon a judgment at Law against an executor or administrator. It must be founded in a similar case on a decree in Equity; for execution is to issue in the same manner as in a Court of Law. The same argument, which would prove that a *fi. fa.* could not issue against the lands of a deceased debtor, in the hands of his heir or devisee, upon a decree for money, would prove, that a *fi. fa.* could not issue against the lands of the debtor in his own hands, upon a similar decree against him.

I very much regret this difference of opinion, but entertaining doubts, I could not do otherwise than express mine.

Per Curiam.—Let the *scire facias* be quashed.

Edmund D. McNair, Adm'r. of Ebenezer McNair,
v.
Thomas Ragland et al. Adm'rs. of Richard Kennon,
From Chatham.

A debt existing before the depreciation in the currency, which took place in the revolutionary war, might have been discharged in that currency. But if not paid or tendered during that period, upon the subsequent resumption of cash payments, the whole sum is to be paid, without reference to the depreciation.

A debt contracted while the currency was depreciated, upon the resumption of cash payments, must be discharged according to the rate of the depreciation at the date of the contract.

But an agent, charged with the collection of debts, is responsible only for what he collects; and if he received a debt in the depreciated currency, upon a settlement made after the resumption of cash payments is to account only for the value of the currency at the time it was received.

And where a collecting partner owed a debt to the copartnership, contracted before the revolutionary war; and also collected money due to the copartneship during the depreciation of the currency, upon a settlement of his accounts, allowance was made for the depreciation upon money collected, but not upon the debt due from himself.

A debtor is liable to pay interest, by virtue of his contract, whether he made it or not. An agent, or trustee, is liable, only because he made it, or might have made it, but for gross neglect. As where a collecting partner, in obedience to the confiscation acts, *bona fide* paid the share of his alien partner into the treasury, it was *held*, that whatever may be the effect of the treaty upon such payment of the principal debt, the collecting partner was not liable for interest thereon.

The treaty of 1733 revived the rights of British creditors, and restored them the right to sue, as if the confiscation acts had not been passed. The war of 1812, there being no new confiscation acts, did not affect those rights, otherwise than to suspend the right of suing.

Whatever may be the effect of the treaty of 1783 upon the mutual rights of copartners, where the whole partnership property, or a portion of it, belonging to an alien partner, was seized under the confiscation laws, yet where the copartnership owed the alien partners for advances, the resident partner's share of these advances constituted, in Equity, a debt, which he owed his copartners, and which is within the treaty.

One of several administrators, who assents to the delivery, by his co-administrator, of the assets to the next of kin, before the payment of debts, is guilty of a *devastavit*. So also, if the assets were delivered over in obedience to the decree of a Court, unless he shows that it was *in invitum*.

The original bill was filed in 1800, by *Ebenezer McNair* in his own right, and as the executor of *Ralph McNair*, deceased, against the Defendants, as the administrator, of *Richard Kennon*, deceased; having abated, it was revived by the present Plaintiff, who is the administrator *de bonis non* of *Ralph*, and the administrator of *Ebenezer McNair*. It charged that in August, 1771, a co-partnership was entered into by articles under seal, and set forth in the bill, between said *Richard* and *Ralph*, by which another partner might be admitted by the latter; and that accordingly, the said *Ebenezer* was admitted; that the business was pursued until August, 1774, when it was dissolved; and that *Kennon* had possession of the books and effects to close the concern, as by the articles he was bound, and did proceed therein, until 10th April, 1777; when a balance account of the concern was made up, signed and delivered by *Kennon* to the other partners, who adhered to the enemy, and were about leaving, and did shortly thereafter leave this country. The bill charged, that *Ebenezer McNair* was admitted a partner, as a member of the firm of *Ralph* and *Ebenezer McNair* of Hillsborough—that is, *Ralph* two-sixths and *Ebenezer* one-sixth. A copy of the balance account was exhibited with the bill; by which it appeared, that the funds of the firm then outstanding, or in *Kennon's* hands, were of the value of £3069 0s. 10d. And the firm owed a debt to the firm of *Ralph & Ebenezer McNair*, for goods furnished to *Richard Kennon & Co.* of £1853 5s. 3d., and that the profit then apparent was the sum of £1215 15s. 7d., whereof one half was *Kennon's;* the sum of £405 5s. 2d. was *Ralph's*, and the sum of £202 12s. 6d. was *Ebenezer's*. It was admitted, that by a payment the debt was reduced to £1701 15s. 2d., on the 1st of July, 1777. It was charged, that *Kennon* collected the whole effects, and died in 1794 intestate; and that the Defendants jointly administered on his estate, and received his assets sufficient to discharge the Plaintiff's demand. The death of *Ralph* was then charged, and that *Ebenezer* was his executor. And the bill prayed an account of the copartnership, and payment of all sums due. It was not stated when *Ralph* died, nor when *Ebenezer* returned to this country.

To this bill the Defendants originally put in a plea of an account stated on the 10th of April, 1777, and relied on the statute of limitations from that time. This plea was overruled in 1819. It specified the precise sums stated in the account exhibited in the bill, and that it was of the same date.

Upon the overruling of the plea, the Defendant, *Ragland*, alone answered. The material parts of the answer were, that a copartnership between *Kennon* and *Ralph* was admitted; but not the particular articles, nor *Ebenezer's* participation, nor his executorship. It contained no account of the partnership, and averred, that the few papers which *Kennon* left concerning it, were taken by the Defendant, *Hines*, who had removed to Georgia, and that he, *Ragland*, was unable to render any account. He denied, that he had any of *Kennon's* assets, and said that the administratrix and the other administrator took the whole; that he never interfered, further than to join in the inventory, and aid in making sales, and that the others received the bonds, and collected the money on them. He then stated, that pending this suit, by some proceeding in Chatham County Court, a division of the negroes and other parts of the estate, was made amongst *Kennon's* children, to whom the whole was delivered. He did not set forth what agency he had therein, nor whether he assented or objected thereto. The answer further alleged, that *Kennon*, in April, 1781, paid into the treasury the sum of £1941 3s. 2d., under the confiscation acts, and claimed a credit therefore against both *Ralph* and *Ebenezer*.

The bill was taken *pro confesso*, as to the other Defendants.

Upon the case thus made, a reference was ordered, and the Master made a report, in which he submitted several points for the decision of the Court. Besides those, others were made by exceptions on the part of the Defendants.

The Master charged *Kennon* to *R.* and *E. McNair*, with the sums of £1701 15s. 2d. (the balance due for merchandise or stock) and £607 17s. 9d., their shares of the profit, *as a debt* due from *Kennon* to them on the 1st of July, 1777. He gave him credit for £160 10s. 11d., being one half of the debts to the firm not collected, and found a balance of £2125 2s. 0d., on which he charged interest from the 4th of July, 1782, to the taking of the account. He stated the account in the present currency, viz., at ten shillings to the dollar. He did not credit *Kennon* with the sum of £1941

3s. 4d., said to be paid into the treasury; but stated that the Defendant produced the receipt of *Matthew Jones*, Treasurer, therefor, without finding whether the payment was actually made, or what was *Jones*' official character. The receipt itself was expressed to be, "in part of *Ralph* and "*Ebenezer McNair's* confiscated property."

The Master submitted, first, whether the sum due to the Plaintiff, was to be computed at eight or ten shillings to the dollar; secondly, whether the depreciation of the paper money, in which *Kennon* probably collected the debts, was to be allowed; and thirdly, whether *Kennon* was entitled to a credit for the money paid to *Jones*. The Defendant excepted to the charge of interest before the filing of the bill; and likewise to the charging *Kennon* with the effects of *the firm*, as so much money in his hands on July 1st, 1777.

The books of the firm were produced, and upon inspection, appeared to have been regularly and fairly kept by *Kennon*, up to the time of his death. In them a *cash account* appeared balanced monthly; and the several periods of receiving the money, from whom received, and how invested, are also stated. Likewise the account of *R.* and *E. McNair*, in which the item of £1741 3s. 4d., is charged to them, corresponding with *Jones's* receipt.

Winston, for the Defendant, insisted, 1st, that although the administrator joined in the inventory, this did not create a presumption of assets, and cited *Wesley* v. *Clarke* (1 *P. Wms.* 83, *n.*)--*Scurfield* v. *Howes*, (3 *Bro. C. C.* 90.)—*Langford* v. *Gascoigne*, 11 *Ves.* 333.)—*Hovey* v. *Blakeman*, (4 *Ves.* 596.)—*Bacon* v. *Bacon*, (5 *Ves.* 331.)—*Mangrum* v. *Sims*, (1 *Law Rep.* 547.)—*Gordon* v. *Neely*, (3 *Hawks*, 239.)—*Hutson* v. *Hutson*, (1 *Atk.* 400.)—2nd. The receipt of the treasurer and confiscation acts furnish a sufficient defence. (*Vattell*, 372, *Book* 3, *Ch.* 10, *S.* 375.—*Book* 4, *Ch.* 2, *S.* 20, 23.) If the treaty of peace did suspend the operation of the act of 1779, that treaty was abrogated by the war of 1812. *Den. ex. dem. of Cuningham* v. *Michel*, (*Con. R.* 77.)—*Ray* v. *McCulloch*, (*Con. R.* 492—11 *Sec. of Act of* 1779, *Rev. C.* 153.)

Seawell and *Gaston*, with whom was *Badger*, for the Plaintiffs, cited *Sadler* v. *Hobbs*, (2 *Bro. C. C.* 117.)—*Chambers* v. *Minchin*, (7 *Ves.* 186—2 *Fonb.* 180, 181.)—*Underwood* v. *Stevens*, (1 *Mer.* 712.)—*Shipbrook* v. *Hinchinbrook*, (16 *Ves.* 478.)—*Leigh* v. *Barry*, (3 *Atk.* 582.)—*Hamilton* v. *Eaton*, (*Martin's Rep.* 75.)

Upon the question of interest—*Franklin* v. *Frith*, (3 *Bro. C. C.* 433.)—*Willis* v. *Commissioners*, (5 *East.* 35.)—*Dunscomb* v. *Dunscomb*, (1 *Johns. C. R.* 510.)—*Manning* v. *Manning*, (1 *Johns C. R.* 527.)—*Schieffelin* v. *Stewart*, (1 *Johns C. R.* 624.)

Nash, in reply, cited *Hovey* v. *Blakeman*, (4 *Ves.* 604.)—*Walker* v. *Symonds*, (3 *Swanst.* 61.)—*Bacon* v. *Bacon*, (5 *Ves.* 301.)—*Balchen* v. *Scott*, (2 *Ves. Jr.* 678—*Shepperd's Touchstone—Toller*, 439.)—*Higgins* v. *Crawford*, (2 *Ves. Jr.* 571—1 *Starkie* 32—1 *Kent's Com.* 165—*Martin's Law of Nations*, 55.)—*Governor* v. *Howard*, (1 *Mur.* 465.)—*Knight* v. *Reese*, (2 *Dal.* 182.)

Ruffin, Judge, after stating the case as above, proceeded: Upon these facts and the points submitted, several questions of law have been raised, some of which are of real difficulty; on which able and full arguments have been made at the bar. Others have not been so fully discussed, as the Court, in considering the case, think they merit; and therefore, a further opportunity will be afforded for such additional investigation, as their importance to the parties seems to call for. The Court, however, will proceed now to decide most of the questions involved, in order that the future attention of the Counsel and the Court may be confined to as few points as possible.

Undoubtedly, the pound, during the time this copartnership did business, was computed at $2 50. Their dealings were at that rate. At the time the state of the concern was taken, that is, the 10th of April, 1777, the dollar had depreciated to one and a half for one. But if *Kennon* was *debtor* to the Plaintiff before that day, and then ascertained the balance, but did not pay it, he cannot avail himself of the depreciation. If he had then tendered the money, the creditor must have received it, depreciated as it was. And if he had contracted a debt at that day, its value must have been estimated, after the resumption of payment in *specie*, as of the time of contracting the debt. But as these were previous transactions; if they be regarded as creating a debt from *Kennon* to the Plaintiff, the depreciation does not affect them, since they have not been paid before the depreciation ceased. It must now be paid in dollars at eight shillings, and not at twelve shillings.

But although such be the rule in relation to *debts*, and must be applied to the present demand, as far as any part of it shall be found *debt*, properly speaking; yet in relation to the firm, *Kennon* did not stand as debtor, but as acting partner and trustee. Immediately after April, 1777, the paper money depreciated rapidly, and continued to do so, until it reached eight hundred for one in 1782. In collecting the debts, *Kennon* did not make himself chargeable with good money for bad. He is only charged with what he received, or with converting what he received. He stands in this respect, precisely as any other agent, whom all of the partners had appointed. Such an agent would have been liable to pay to each partner his share of the effects, actually collected. If they turned out, by the depreciation, to be of no value, then there would have been a total loss of the copartnership effects; and when the copartners came to settle among themselves, their demands against each other would have been adjusted, on the footing of a total loss. In ascertaining the final profit or loss of the business, then, the depreciation of the money must be taken into account. The profit apparent upon the balance account of April 10, 1777, is not a real, ascertained profit. The business was not then closed. The profits might have been subsequently increased by interest, purchases of land in payment of debts, or other means. They might have been altogether sunk in insolvencies of debtors, or destruction of property during the war, or in the depreciation of money, at the time it was received, or afterwards. This loss is not to be thrown entirely on the collecting hand. If *Kennon* were now living, he might and would be required to state in what funds the payments were actually made. The parties are at liberty now to prove, if possible, that fact. Some of the debtors may be living. Some of *Kennon's* receipts may be found, expressing specie payments. Some deeds for land belonging to the firm may be traced, in which the consideration will exhibit the truth. The money actually received is that with which he is chargeable. But in the absence of all evidence, the history of the times, as well as the scale of depreciation, fixed by law in 1783, must guide us. The books show the periods of receiving the money, and its value must be determined by that. There is no other mode, at this remote day, of arriving as nearly at the truth. And the Court feels the less reluctance in relying on *Kennon's* entries for this purpose, because, on looking into the books, it is obvious, that he meditated no advantage of his absent partners, but in good faith kept the accounts, and protected their interests, as far as he could, or thought himself justified. He refrained until 1781 (probably as long as he was allowed) to submit their share to the operation of the confiscation acts. He then charges just the sum paid to their individual account. He afterwards kept that account open, and continued his cash account, and made several entries in it. Had he lived, unquestionably this controversy would not have arisen—at least by his fault, if we are to judge by the acts of his life. The depreciation is therefore proper to be allowed, in ascertaining the value of the partnership effects, which came to *Kennon's* hands.

The charge of interest would be properly made, if this were a debt, and if it be a debt not affected by confiscation. But at present, it is not material to consider the latter point: because clearly, for the reasons already given, *Kennon* was not a debtor; at least to the extent of the partnership funds left in his hands. It is repeated that he was a trustee. He is therefore chargeable with interest only in two cases: first, if he made it; secondly, if he was in duty bound to make it, might have made it, and did not. As far as the debts increased by interest before collection, that attached itself to the principal, and became principal in his hands. But if it be apparent that a trustee did not make interest, and could not; that he was prevented by law from doing so; that the effects were seized out of his hands, he is not upon general principles chargeable with interest. A debtor is obliged to pay interest, because it is a part of his stipulation. Whether he makes it or not; whether he has the money in his desk or not; whether he lays it out in funds bearing interest or not; neither charges him, nor discharges him. His contract obliges him. An agent or trustee stands upon a different footing. He is liable *prima facie* for interest made, or for grossly neglecting to make it. If therefore *Kennon* did in fact pay into the treasury funds in his hands *bona fide*, he is not liable for interest, *as a partner*, until the bill filed. He is not chargeable for unfaithfulness, where he was not unfaithful. The Court holds this position, although the treaty of 1783 should operate upon that part of the demand, which is principal money. That treaty may include a trust fund, like that in dispute. Its obvious import respects debts. But for the present, the Court does not mean to determine, whether in its extent, it is broad enough to render one co-partner personally liable to another, for the share of the latter, seized out of the hands of the former by the sovereign, Be that as it may, it cannot have the effect of turning an agent into a debtor, and compelling him to pay interest; nor the obedience to the law by a trustee acting *bona fide*, into a breach of trust rendering him liable for consequent damage. The opinion of the Court on this point does not rest on the strength of confiscation acts, as confiscations; whereby *Kennon* is discharged from a demand to which he would be otherwise liable. On the contrary, he was never liable for interest; because he did not contract, as a debtor, to pay it; and because, as trustee, he did not make it, and could not make it.

The effect, upon the principal sum itself, of the payment into the treasury, depends upon the construction of the treaty of peace with Great Britain. Whatever doubts were once entertained upon the operation of that instrument, its construction and obligation have been so long settled by the Courts of the Union, and acknowledged by the citizens and Courts of North Carolina, in reference to *debts*, that this Court could not suffer an argument against it. The Counsel for the Defendant have, very ingeniously, put their case upon a new point, as regards the treaty; they argue that the war of 1812 annulled the treaty; that the operation of the confiscation acts was prevented by the treaty alone; and that upon the expiration of the latter, the former revived. If the treaty were to be regarded in the light of a repealing statute, and the war a repeal of that, the argument would be fair, and the conclusion sound. But the similitude does not exist. The reason why the repeal of a repealing statute revives the law first repealed is, that it necessarily denotes the intent of the Legislature, that such shall be the case. There can be no other motive for the repeal of a repealing statute. That has no application to the case of the law and the treaty under consideration. If the war had been declared by this State alone, such an infer ence could not be drawn. Much less, when it was the act of another government, having no power over our State laws. But why suppose, that the confiscation acts of the revolution were intended to be revived by the war, when no new confiscations were enacted. The persons formerly offending had most of them, been long in their graves; and it is not to be supposed, that the hard measure of seizing private property, though enemies', was intended thus indirectly to be effected. The treaty revived the rights of the British creditors, and gave them as full force, as if the confiscation acts had never passed. It abrogated those acts altogether, and left those rights as those of other friendly aliens. Upon the breaking out of a new war, they depended upon the general doctrine respecting debts to alien enemies. They were not forfeited. There was a temporary disability to sue, which ceased with the war. But even that does not appear to be the case here: for *Ebenezer McNair* states himself in the bill to be then of the city of Richmond, in Virginia. Upon the general question, however the Court is clear, that the confiscation acts, as continuing laws, do not bar the Plaintiff; not because the treaty remains in force, notwithstanding the late war; but because rights arose under the treaty while it was in force, which nothing that has been since done has destroyed, or was intended to destroy.

What effect this shall have upon the present controversy in all its parts, the Court will not now conclusively determine. Whether *Kennon* shall stand charged with or excused from the £607 17s. 9d., stated to be *profit*, or whatever other sum may, upon taking the accounts, be found to be the profit, the Court reserves to be further considered. It may be, that as far as the profit goes, or as far as the *McNairs* were interested, *as partners*, in the firm, the confiscation and seizure may be a specific destruction of the trust fund; and that the treaty gives no right to them to seek reparation from their copartner. It might be, if the stock of the partners, as well as their profits, had been equal, that the confiscation might have exonerated *Kennon* altogether. Or it may be, as a part of the Plaintiff's demand is for supplies furnished the store, that *Kennon* must himself indirectly sustain a part of the burden of the confiscation, by considering the loss of the *McNairs*, the general loss. It may be material, too, to consider, that the payment to the public, if made at all, is said to be on account of the confiscated estates of *R.* and *E. McNair*, when the act of 1779 mentions *Ralph* alone. That is an office found as to him; but even if *Ebenezer* comes within the provisions of the general previous act, a further office must be shown as to him. And then the effect of that, whether the loss shall fall on all or on each separately, will remain to be determined. I am now speaking in reference to the partnership effects being in *Kennon's* hands, as the acting partner and trustee for the firm. And the Court declines declaring the rights of the parties; because the points were not discussed at the bar, and perhaps the cause may be decided yet, without the Counsel considering it worth while to enter into that discussion. But all equity on these points is reserved; and in taking the future accounts, the parties are at liberty to have any matter stated, which will raise the questions.

But whatever may be the rule, regarding *Kennon* as a trustee of the fund, it can have no application to a large, and indeed the most important part of the Plaintiff's demand. *Ralph* and *Ebenezer McNair* were *creditors* of *Richard Kennon & Co.* in the sum of £1701 15s 2d.; for one half of which *Richard Kennon* was personally their debtor, in the event even of a loss of all the profits, and of a total loss of the whole capital—from whatever cause such losses might arise. It is true, they could not sue him at Law; nor could they in Equity, as for a specific sum, unconnected with the other transactions of the house, because *Kennon* might, in like manner, be a creditor of the concern. But here, the parties have, in fact, so far adjusted the partnership, as to show what the firm owed to one partner, and what the other partner owed to the firm. They found the *McNairs* creditors, to the amount above mentioned; and they found *Kennon* a debtor to the firm in the sum of £73 9s. 7d. It remained only to close the concern, so that it might appear, what final profit or loss might be made. If a profit then the *McNairs* would receive their whole *debt*, and a share of the profit; if a loss, the *McNairs* would receive such a portion of their debt, as the joint property could satisfy; and if the residue, one half must be borne by themselves, and the other half paid to them by their partners. In the most adverse event, therefore, *Kennon* is a *debtor*, not to the firm, but to *R.* and *E. McNair*, in one half of their advance of £1701 15s. 4d. after deducting therefrom his own debt to the firm of £73 9s. 7d., of which last sum he ought to pay to them the whole with interest, deducting that for the war. It may be said, that this money was also in his hands as a part of the trust fund. It is admitted. But it was a trust for his own benefit, as well as theirs; and if the fund be lost he remains a debtor *to them* for a share of their advance over and above his. And however the confiscation, but for the treaty, might have protected him from that (as indeed it would from any other debt) yet the effect of his fiduciary character cannot be carried so far, as to evade the treaty, as respects the debt due from himself. To this extent, he was strictly a debtor. For by the articles, no particular stock is to be provided by either party. *McNair* was to import the goods, and put them to the firm at a very low advance, and *Kennon* was to sell them, being allowed at first a salary for his time out of the profits, and each to share equally in gain or loss. Afterwards his salary was given up, in consideration of the services to himself of the storekeeper paid by the company. The debt to *McNair*, therefore, is for goods, and stands on the same footing with a purchase from another person. To this extent, at all events, *Kennon's* estate is immediately liable to the Plaintiff. It will be to a greater, if, upon taking the accounts, a profit shall still be found, or less than a total loss; because *McNair* is entitled to full payment out of the fund, as far as it goes; and when that fails, to call upon *Kennon* for half the deficiency. The Master reports sundry small payments for *McNair*, which the Court will not now consider, but leave to be adjusted by an accurate account. In the mean time, as it is certain that the aggregate of principal and interest thus due must exceed the sum of $6000, a decree must be pronounced therefor presently for the Plaintiff, and another reference to the Clerk, to state the precise sum due on this part of the case. If the Plaintiff be satisfied therewith, no further accounts need be taken; but if he should desire it, the Master must take a full account of the partnership, to ascertain what the loss or gain was, and adjust it between the copartners. The Court does not think it necessary to distinguish in their opinion, the share of *Ralph McNair* from that of *Ebenezer*, in the sum now decreed; because the whole is for a debt due to the house of *Ralph* and *Ebenezer McNair*, and the distribution between themselves will be made in the settlement of that house, which is not now before us.

The question of the liability of the Defendant, *Ragland*, is then submitted by the Clerk, and has been elaborately and ably argued at the bar. The Court does not feel it necessary, to enter upon the general doctrine of the liability of one trustee, or executor, for the act of another; nor to say, whether that of co-administrators is distinguishable from one or both of them. The facts are but imperfectly reported; and the Court does not choose to lay down any general rule upon the effect of joining in an inventory, or joining in a sale or hiring. But the Master reports, that in 1802, there were twenty-seven slaves, of the value of $200 each, and the Defendant seeks to exonerate himself from answering for their value, by saying that they were divided by order of Chatham County Court, since the filing of the original bill, and while it was pending, amongst his intestate's next of kin, and that accounts of the estate were taken upon a petition in that Court, upon which balances were found due, decreed and paid to the next of kin; but he has laid none of these proceedings before the Master. These facts furnish the specific ground upon which the Court hold, that the Defendant, *Ragland*, is chargeable. Delivering over assets to legatees is a *devastavit* as to creditors. It is true, one executor may assent to a legacy, and therefore probably his assent might not charge a co-executor. But one administrator cannot divide the estate, without the assent of the other. And if administrators are to be placed within the rule of trustees, it is clear that by that rule, if one assents to a disposition of property, wrongful in itself, and not only made that the other trustee might misapply the proceeds, but constituting, in the very act itself, a misapplication, it is a breach of trust, and renders the party responsible. If this division had been made out of Court, there could be no doubt of this consequence. It was a direct concurrence in a *devastavit*. Nor is it less so, when made under decree, unless he shows by the proceedings that he resisted it. For ought we can know, he assented to it expressly, joined in taking the accounts, received commissions, and participated in making the actual division under the decree. The withholding of the record creates every presumption against him. If he was not a party to it, he had it completely in his power to protect himself and the creditors, by taking the property into his possession, or suing for it. If he was a party, then he must be taken as assenting, unless he shows the contrary, and that his efforts were real, and to the utmost of his power

It is to be recollected, that all the proceedings were had whilst the present suit was in progress, and after the Defendants therefore had complete notice of the demand. A creditor must not thus be defeated; but each person contributing to the attempt must answer to him. He is not hereby charged beyond the value of the specific slaves, thus delivered over. When the Plaintiff shall attempt to carry it further, the Court will act upon the case, as it may then be made to appear. At present, it is not necessary to lay down any general rule.

As the Master has taken no account of the partnership, and has proceeded upon a wrong principle in charging *Kennon* with the whole effects as money, the whole report is set aside, as far as it contains the accounts, except that part which adopts the statement of the balance sheet of April 10th, 1777, of the *debt* to *R.* and *E. McNair*, of £1853 5s. 3d., and reduces it, from the admissions in the bill, to £1701 15s. 2d. on the 1st of July, 1777, which makes it unnecessary to pass particularly on the exceptions of the Defendant. And the case must be again referred, to have the accounts taken upon the principles here laid down, if the Plaintiff chooses to proceed therein. And the Court reserves all equity, arising out of any payment made by *Kennnon*, under, or by color of the confiscation acts, as far as it respects every part of the Plaintiff's demand, except one half of the said debt of £1775 4s. 9d. And also refrains from declaring, whether, in fact, he did, or did not make such payment.

Per Curiam.—This cause coming on to be heard on the report of the Clerk, and the exceptions, the Court considers that the account stated by the Clerk is based upon a wrong principle in this; that the intestate *Kennon* is charged with the whole interest of *Ralph McNair* and *Ebenezer McNair*, in the effects of *Richard Kennon & Co.*, as cash in said *Kennon's* hands, and a debt from him to said *R.* and *E. McNair ;* and also in this, that no account is stated of the co-partnership, and therefore the Court doth set aside the report, &c.

And doth declare, that it appears by the balance account of *Richard Kennon & Co.* of April 10, 1777, that *R.* and *E. McNair* were then, *creditors* of the firm of *Richard Kennon & Co.*, in the sum of £1853 5s. 3d. ; which was reduced, as admitted in the original bill by payment on 1st July, 1777, to the sum of £1701 15s. 2d., at the rate of $2 50 to the pound, and that *Richard Kennon* was *debtor* of said *Richard Kennon & Co.*, in the sum of £73 9s. 7d. Declare further, said *Richard Kennon* liable, in case of the total loss of the other effects of said firm of *Richard Kennon & Co.*, to pay to his said co-partners the amount of his said own debt towards their said debt of £1701 15s. 2d., and also (after deducting from the said sum of £1701 15s. 2d., the said sum of £73 9s. 7d.,) liable to pay to them one half of the residue, namely, the sum of £814 2s. 9d., with interest on the said two sums of £73 9s. 7d., and £814 2s. 9d., from the 4th day of July, 1782, as his, the said *Kennon's*, share of the loss of said *Richard Kennon & Co.*, if such total loss did in fact happen : and declare, further, that the Defendants received assets of their intestate to a larger amount in slaves and other specific chattels, (which they now hold, or have wasted,) than is sufficient to pay the said sums and interest as aforesaid : And decree, that the Defendants pay to the Plaintiff the sum of £6000, in part of, and towards the said debt, and that execution issue therefor, against their bodies and proper estates ; and refer again to the Master, &c.

Edmund D. McNair, Adm'r. of Ralph McNair,
v.
Thomas Ragland et al. Adm'r. of Richard Kennon,
From Chatham.

An administrator, who has revived a suit of his intestate, need not produce his letters of administration at the hearing of the cause; it is sufficient if he produce them when the order to revive was made.

It seems, that if a Defendant in Equity intends to rely upon the statute of limitations, it must be pleaded.

Whether accounts between copartners are in any case barred by the statute of limitations—*Qu?*

But where there is an agreement between copartners, under seal, to account, a bill for an account is not barred, before an action on the covenant would be.

Any delay in suing, which can be satisfactorily accounted for by the course of public events, will not be construed into an abandonment or satisfaction of the Plaintiff's demand.

In Equity, an admission in the plea may be used by the Plaintiff against the Defendant.

After the argument of this cause (*Reported Ante p.* 516,) on the report of the Master and the exceptions thereto, the Defendant, *Ragland*, filed a petition to re-hear the order of this Court, made at June Term, 1829, referring the accounts to the Master, under which order the report which has already been stated was made. The grounds upon which the order was sought to be set aside, will be found fully stated in the opinion of his Honor Judge Ruffin.

Winston for the Defendant, *Ragland*, cited *Humphreys* v. *Humphreys*, (3 *P. Wms.* 349.)—*Osgood* v. *Franklin*, (2 *Johns Ch. R.* 1.)—*Fell* v. *Lutridge*, (2 *Atk.* 120.)—*Doolittle* v. *Lewis*, (2 *Johns C. R.* 45.)—*Goodrich* v. *Pendleton*, (4 *Johns. C. R.* 551.)—*Willis* v. *Jernigan*, (2 *Atk.* 252.)—*Barber* v. *Barber*, (18 *Ves.* 286.)—*Martin* v. *Heathcote* (2 *Eden.* 169.)—*Coster* v. *Murray*, (5 *Johns.* 522.)—*Foster* v. *Hodgson*, (19 *Ves.* 180.)—*Beckford* v. *Close*, cited in 2 *Bro. C. C.* 644—*Hardy* v. *Reeves*, (4 *Ves.* 479.) *Hodle* v. *Healy*, (1 *Ves. & Bea.* 536,) *Mitford*, 100.—*Sturt.*

v. *Mellish,* (2 *Atk.* 1, 179.) — *Sherman* v. *Sherman,* (2 *Vern.* 276.) — *Lacon* v. *Briggs,* (3 *Atk.* 105.)— *Murray* v. *Toland,* (3 *Johns. C. R.* 574.) — *Ray.* v. *Bogart,* (2 *Johns. Ca.* 432.)—*Yates* v. *Bloodgood,* (7 *Johns. C. R.* 90.)

Seawell, contra.

Ruffin, Judge.—Since this cause was argued on the report of the Master, and the exceptions, (*Ante* 516) the Defendants have filed a petition to re-hear the cause, and reverse the order of June, 1829, to account, under which the report has been made.

The first objection to the relief is, that there is no proof of the death of *Ralph McNair.* That is susceptible of two answers; one, that it is presumed from the grant of letters testamentary to *Ebenezer McNair,* and of administration *de bonis non* to the present Plaintiff; the other, from the great length of time since he was heard of; there being no proof in the cause that he was alive, since he was mentioned in the act of 1779, as having adhered to the enemy, and gone out of the United States.

Another objection is taken, that the present Plaintiff does not show his own letters of administration. He states them in his bill of revivor, and they are not admitted in the answer. It is not necessary, that he should have them on the hearing of the original cause. It was sufficient, that he should show them when he applied for the order, that the suit should stand revived. It is like reviving at Law, upon the death of the Plaintiff. The Court must decide upon the character of the person applying to revive, before he is allowed to revive. At Law there is no plea given, which can put that character in issue; for the suit is to stand revived, in the same plight in which it stood when the original party died. The Court then *ex necessitate* decides the question on motion, and by inspection of the letters of administration. If at any time it should be made to appear, that an imposition has been practised on it, the Court possesses full power to protect itself, and to do right to the parties. But the party is not to be held always prepared with his proof. The letters form no part of the evidence on the hearing of the first suit. Here, the order of revivor is expressed in these words: "It appearing to the Court, that *Edmund D. McNair* has authority to revive the original suit, it is ordered to be revived." This is conclusive in all subsequent stages, until that order itself be reversed.

It is next insisted, that the Plaintiff is barred by the statute of limitations. That would not follow, were the case one to which the statute applied. For it is a part of the case, that the *McNairs* departed from the country, and although *Ebenezer* was a resident of Virginia when he filed his bill, it does not appear how long before he had returned. If the bill must bring the case out of the statute, this does it *prima facie*, until a return to the country shall be shown on the other side. There is no plea of the statute, nor is it relied on in the answer. The Court does not mean to say, that the late English cases are not law, which dispense with a plea of the statute, and allow it to be taken advantage of on demurrer, or at the hearing; though we incline to the opinion expressed by *Lord Thurlow*, in favor of a plea; because that prevents surprise, and the Plaintiff, upon notice, might show himself within an exception. But in our opinion, this case is not within the statute at all; being between copartners, touching their co-partnership dealings, and constituting a trust, appearing upon articles under seal. Whether it would be so, if such were not the articles, we more than doubt. But where there is an agreement under seal to account, a bill for an account cannot be barred, certainly, before an action on the covenant would.

Nor does the Court think the lapse of time destructive of the Plaintiff's rights. It would be, were the transaction one of ordinary times, and between citizens of the country. Several years were those of war. Upon the peace, the treaty gave the power to sue, it is true. But we know, that every resistance was made to the claims of British creditors, both by the debtors themselves, and the citizens generally. Until the adoption of the Federal Constitution, in most of the States, the Courts refused to execute it, upon the ground that the British violated it, by refusing to surrender the western posts. Respectable professional gentlemen throughout the country maintained, and often sustained that position in Court. In this State, it was found necessary by the Legislature, as late as November, 1787, to enforce it by statute; and even after that, the effect of confiscation was violently contested, and never settled, until the case of *Hamilton* v. *Eaton* (*Martin*, 77) in this State, and that of *Ware* v. *Hylton* (3 *Dallas*, 199) went up from Virginia to the Supreme Court of the United States in 1796. This suit was not long delayed after those decisions. A delay thus accounted for by the course of public events, cannot be construed into an abandonment or satisfaction of the Plaintiff's demand.

The Defendant has likewise insisted, that there is no proof of the co-partnership, or of the balance account, which forms the basis of the present demand, and of the accounts directed. It seems that the originals of those documents have been lost out of the Master's office, during this protracted litigation. But a copy of the balance account remains, and is identified by the deposition of the Master of Orange, as having been admitted before him by the Defendant, *Ragland*, to be a copy. But that it is a copy, and that the original was a genuine paper, is placed beyond doubt by the plea formerly put in by all the Defendants. That plea states, as its very point, this account, and relies on it as a *stated account* between the parties, on which there was a remedy at Law. There can be no higher evidence than this. It is not like a plea at Law, where each plea is independent. But here is a positive admission on oath, and to this purpose, it is the same as if it were in the answer. From this document, if there were no other evidence, the partnership is clearly established; for the fund, is stated, the debt to *R.* and *E. McNair*, and the several amounts and proportions of profits of each partner, as alleged in the bill. Besides this, the books of the firm contain evidence equally strong.

The order complained of must therefore stand, and is affirmed.

Per Curiam.—Petition dismissed.

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William Harrison
v.
William H. Battle and
Nathaniel Hunt, et al.
} From Franklin.

Under the first section of the act of 1812 (*Rev. C.* 830) subjecting trust estates to execution, only such estates as are held in trust for the Defendant in the execution solely, are within the operation of the act. As the Sheriff's deed transfers the estate of both the trustee and *cestui que trust*, those cases where it is necessary for the purposes of the trust, that the trustee should retain the legal estate, are not within its operation. As in case of a conveyance to sell and pay debts, and then in trust for the bargainor, the estate of the trustee is not destroyed by an execution sale of the interest of the *cestui que trust.*

But the interest of the bargainor, after payment of the debts, being in no respect distinguishable from an equity of redemption, may be sold under the second section of the act.

That section subjects equities of redemption in land only, to execution sales. The same interest in chattels is left as at common law, and can be subjected to the satisfaction of an execution, only in a Court of Equity.

Before the passage of the act of 1812, a Court of Equity lent its aid to an execution creditor, to subject an equity of redemption subsisting in favor of the Defendant, to the satisfaction of the execution. It will do so still, especially as the remedy is not so perfect at Law, as it can be made in this Court, by ascertaining, before a sale, the amount of the debts charged upon the land.

A creditor must establish his debt at Law, to entitle himself to the aid of a Court of Equity. But a return of *nulla bona* is unnecessary where it appears that all the debtor's property has been placed beyond the reach of final process.

Where lands and slaves were conveyed, in trust to pay debts, with a resulting trust in favor of the bargainor, and after its execution, the bargainor made further assignments of the resulting trust, to secure debts, and judgments were also recovered against him—*held*, that executions bound the resulting trust in the land from the *teste;* and if they overreached the assignments, had a priority; and that as to the resulting trust in the slaves, it was bound in Equity in favor of the creditor who first filed his bill, without reference to the *teste* of his execution, and that assignments made before the filing of the bill had a preference.

Creditors secured by the deed upon both land and slaves, are, in favor of the execution creditors, having a lien upon the resulting trust in the land, marshalled, so as to have their debts satisfied *pro tanto* by a sale of the slaves.

The Plaintiff alleged, that he was the surety of the Defendant *Hunt*, in a note for about $2,600, discounted at the Bank of Newbern; that *Hunt* being in failing circumstances, the Plaintiff had procured an action to be brought by the bank, in which judgment was recovered by the Plaintiffs at Law, at September Term, 1828, of the County Court of Franklin. That pending the action, viz.: on the 6th of September, 1828, the Defendant *Hunt* had conveyed to the Defendant *Battle*, all his property, which could be seized under an execution, in trust to pay certain debts due by him, *Hunt*, which were mentioned in the deed—with a trust as to the residue, after paying those debts, to *Hunt*—that the property thus conveyed, was much more in value than the debts secured by the deed—that execution upon the judgment obtained by the Bank of Newbern, issued, which the Plaintiff procured to be levied upon the property thus conveyed, subject to the claim of the Defendant, *Battle*—and that if the Defendant, *Battle*, sold only so much of the property conveyed as was necessary to pay all the debts secured by the deed to him, that there would be a large surplus, amply sufficient to satisfy the execution in favor of the bank; but that the Defendant, *Hunt*, had given sundry orders upon the Defendant, *Battle*, for the surplus, over and above the sum due on the debts thus secured, and threatened to exhaust the same by similar orders, and that if the Defendant, *Battle*, should sell, in consequence of these orders, and pay over accordingly the whole of the proceeds, in his hands, there would be nothing from which the Plaintiff could be imdemnified, against his liability as the surety of the Defendant, *Hunt*, who was insolvent.

The Plaintiff then averred, that he had made the Bank of Newbern secure, in the ultimate satisfaction of their judgment, and had taken an assignment thereof.

The prayer was for an injunction, restraining the Defendant, *Battle*, from selling more of the property conveyed to him than was necessary to satisfy the debts secured by the deed of trust, and that the residue in his hands might be subjected to the satisfaction of the execution in favor of the President and Directors of the Bank of Newbern, who were also made Defendants.

The Defendant, *Battle* in his answer, admitted the execution of the deed of trust to him, by the Defendant, *Hunt*—that before the sale of any property under the deed, and on the 23d of October, 1828, he received notice of an assignment of the residue in his hands, made by the Defendant, *Hunt*, on the 16th of that month, to *Thomas T. Russell* and *George W. Freeman*, to secure them, as the sureties of *Hunt*, in two notes for $1000 and $800, held by the Bank of the United States: That on the 1st of January, 1829, a similar assignment of the residue, after satisfying, *Russell* and *Freeman*, was made by the Defendant, *Hunt*, to secure *Peter Arrington*, in the sum of $1400, and on that day notice thereof was given to him, the Defendant *Battle*: And that also, on the 12th of February, 1829, a similar assignment of the surplus, after satisfying *Russell*, *Freeman* and *Arrington*, was made by *Hunt*, in favor of *James Hilliard*, to secure the sum of $424, notice of which was also given him. That he, the Defendant, not believing he had power to sell under the deed of trust, made by *Hunt*, to him had, done no act, whereby he in any way sanctioned those assignments, and had merely acknowledged notice of them: That the personal effects of the Defendant, *Hunt*, had been sold, to the amount of $10,466, with which all the debts, secured by the deed of trust, had been paid, and that a valuable real estate, and several slaves, and other minor articles of personal estate, were yet unsold, the legal title of which was still in him. The Defendant disclaimed to hold any thing beneficially, and submitted to any decree which would indemnify him.

The Defendant *Hunt's* answer corresponded, in every respect, with that of the Defendant *Battle*.

The assignment of the judgment and execution, by the President and Directors of the Bank of Newbern, to the Plaintiff, was admitted by them, and not denied by the other Defendants. *Russell*, *Freeman*, *Arrington* and *Hilliard* were made Defendants, and by their answers, only set up the several assignments made to them, as stated in the answer of the Defendant, *Battle*.

By an order made in the cause, *Battle* was directed to sell all the property of the Defendant, *Hunt*, remaining unsold, and hold the proceeds subject to the decision of the Court.

By another order, all the execution creditors of the Defendant, *Hunt*, were allowed to make themselves parties; and a number of them availing themselves of this liberty, a reference to the Master was made, to ascertin the amount of their judgments, and the time when executions issued upon them, together with the return thereof.

The cause was heard upon these facts, and the reports of the Master on the above reference, and of the commissioner *Battle*, as to the sale of the residue in his hands, after paying the debts secured by the deed of trust.

The cause was argued at December Term, 1829, by *Seawell*, *Gaston*, and *Badger*, for the Plaintiff; and by the *Attorney-General*, for the assignees of the residuum; and at the last term, by the same gentlemen for the Plaintiffs, and by *W. H. Haywood*, for the assignees.

CUR. VULT. ADV.

HENDERSON, Chief-Justice.—The *fieri facias* of the Newbern Bank, to whose rights *Harrison* is substituted, formed no lien, independent of our act of 1812, (*Rev. C.* 830) on *Hunt's* interest in the property conveyed in trust to *Battle*, neither this property itself, nor the trust resulting to *Hunt* being the land, tenements, goods or chattels of *Hunt*. As therefore it could not be levied on, or sold by the common law, to satisfy the execution, no lien arose by its issuing, or what the Sheriff calls its levy. For as the lien arises, or is created, as a mean to the end, it would be in vain for the law to raise it, when the end could not be attained. Nor is the trust in favor of *Hunt* one of that description, authorised to be taken in execution, under the first section of the act of 1812. The use of trust, there spoken of, is a pure and unmixed one; for the doing execution under that section, to use its own terms, divests the estates both of the trustee and *cestui que trust*, and transfers them to the purchaser. In the present case, therefore, if it operated, it would give both *Hunt's* and *Battle's* estates to the purchaser, under the *fieri facias*, and entirely disable *Battle* from performing the other trusts. In other words, *Battle* is not seised or possessed to the use of, or in trust for *Hunt*, but to the use of *Hunt* and others, whose interests are no ways united with *Hunt's*, but are entirely of a different nature. This has been the construction, heretofore put upon the act, and it is believed to be the correct one.

But we believe, that so far as regards the land, *Hunt's* interest may be sold under the second section of the act; for we cannot distinguish his right to have the lands again, after the payment of the debt, for which this stood as a security, from an equity of redemption. It has all the essentials of that right, although it wants some of its formal parts; it is conveyed to secure the payment of a debt; upon the payment of the debt, *Hunt* has a right to call for a re-conveyance. Whilst in his possession, by the creditor's consent, he is not accountable for the profits. This trust, to be sure, can be closed by a sale, without the intervention of a Court of Equity. The aid of this Court to foreclose an equity of redemption, is required only because the law will not trust the creditor to be both his own agent, and that of the debtor, whose rights it may be his interest to sacrifice. This trust is free from that objection, because the parties have agreed on their trustee. We cannot therefore distinguish this interest from an equity of redemption; and its exemption from sale, under a *fieri facias*, is equally an evil with the exemption of equities of redemption. The mischief is precisely the same, and we therefore think it within the spirit of the second section of the act of 1812.

But that act affects equities of redemption in real estate only: "lands, tenements, rents and hereditaments," are its words. It extends not to trusts, arising out of personal estate. As to that, therefore, the execution formed no lien. We also think, that the execution creditor has the right of coming into this Court, to make the lien effectual as to the land. For although he has a remedy at Law under his execution, it is not an effectual one. If he sells at Law, he must sell *Hunt's* right of redemption only. Its value is unknown. It depends on how much of the debts are paid. This might be known to some, and unknown to others. Bidders, therefore, would stand on unequal grounds; and after a sale, a purchaser would have to come into this Court, to compel the trustee to settle the trust debts, and to *receive* them from him; or to make a sale to raise them, and to pay him the overplus. A sale of property so situated would encourage speculation, that bane of steady and persevering industry and sound morality.

These are some of the reasons which induce the Court to lend its aid. I admit they impugn the policy of the second section of the act of 1812. But the jurisdiction of this Court is not ousted, because a remedy is given at Law, unless it be a plain one. The remedy here is more effectual, because this Court ascertains all the claims upon the thing, and sells the *corpus* itself. The purchaser gets what he purchased, no more and no less. He does not make his gain by another's loss.

As to the trusts upon the personal estate, there is no remedy but in this Court; and that there is here, we entertain no doubt. For do we not mean to consider this a debt due from *Battle* to *Hunt*, even after sale, but as *Hunt's* property in his hands, which cannot be reached at Law. As to the property before the sale, there is no doubt; for it is an estate or interest in Equity, and so it is after sale. For *Battle* is not his debtor, but his trustee. He holds the money as he held the property. When the question of a pure debt arises, it will be time enough to consider, whether it cannot now be reached to satisfy debts. As to the want of the return of *nulla bona*, to give a right to call in the aid of Court, it is deemed to be unnecessary. In this case clearly it is not required, as to those executions which attach on the real fund—and we think that the want of it is supplied, as to all the judgments; for the deed in question conveys the whole of *Hunt's* property, which an execution could reach. But still the *mere creditor* must establish his demand by a judgment. As to the orders and assignments, they have a clear priority over all executions on the personal fund, before such creditor by execution became a party to this bill; that is, orders and assignments have priority to mere judgment creditors, before they became parties' Plaintiffs. But the *teste* of an execution, which overreaches these assignments or orders, will have priority over them, as regards the real estate. As to the other judgments competing with each other, they all stand on equal grounds, regardless of the time of their being obtained, or execution issued thereon. An *alias* or *pluries* execution regularly kept up, will as to trust estate in the land, relate back to the *teste* of the original.

The Master will make an additional report to the next Court, in which he will ascertain the net sum in the hands of the trustee, and will charge him with interest, if he has made interest, and may interrogate him on oath as to that point. He will allow him a commission of two and a half per cent., besides actual expenditures in relation to the trust, and in his attendance in this suit. He will distinguish between the proceeds of the real and personal estate; the amount of debts paid under the trust deed, and charge them in the first instance to the personal fund. He will present a scheme for distribution, according to the principles of the foregoing opinion. Judgments, which are partly satisfied out of the real estate, will come in for balances with other judgment creditors. To give the directions in a few words, they are these:—As to the real fund, executions bind from their *teste*—orders and assignments from their date on both funds—they are of equal dignity; priority of right of satisfaction being gained only by priority of date. Becoming a Plaintiff precludes voluntary transfers as to him. All judgments affecting the personal fund stand in equal degree. The costs are to be paid out of the fund. The funds are directed to be marshalled, in favor of those execution creditors, who had obtained a *lien* at Law upon the real fund, because the creditors under the trust deed have two funds at Law; they but one.

MEMORANDUM.

At the recent session of the Legislature, **DAVID L. SWAIN**, Esq. of Buncombe County, was elected a Judge of the Superior Court, *vice* **WILLIE P. MANGUM**, Esq. of Orange County, who resigned.

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ABATEMENT OF LEGACIES.
Vide *Legacies*, 2, 11, 12, 13.

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Vide *Administrators*, 6, 9, 16.

ADMINISTRATORS & EXECUTORS.

1. A settlement made by an administrator with commissioners appointed by an order of the County Court is no way binding upon the next of kin.—*Wood* v. *Barringer*, 67
2. Where negroes were specifically bequeathed, and the share of one is set apart, and a profit is made by the administrator on another share belonging to an infant, this is no severance of the tenancy in common, and this profit may be recovered by the infant, in a joint bill for an account filed by all the legatees. *Id.* 67
3. Commissions to executors are not a right attached to the office, but an allowance for their trouble and risk in settling the estate. Therefore, where there were two executors, and one took upon himself more than half the trouble and risk, it was held, that he was entitled to more than a moiety of the commissioners. *Grant* v. *Pride*, 269
4. Where slaves are given by will for life, with a remainder over, the assent of the executor to the legacy for life, is an assent to that in remainder.—*Alston* v. *Foster*, 341
5. Where an executor has assented to a specific legacy, and afterwards an execution issues against the goods of the testator, in his hands, a purchaser of that specific legacy, at a Sheriff's sale under the execution, acquires no title. *Id.* 341
6. The lapse of thirty years is no bar to an account of an administration. But where a legatee had given a bond to exonerate the executor from his office, as if he had never qualified, this was held to be evidence of a settlement, and unexplained, to be a bar to an account. *Ives* v. *Sumner*, 342
7. *Qu.* Is not such a bond a release.—*Id.* 342
8. An Administrator Defendant, who denies the right of the Plaintiff, and neither renders an account, nor pays money into Court, is chargeable with interest from the time the Plaintiff's right accrued. *Johnson* v. *Person*, 368
9. Where an estate is charged with the education of children, and a near relative takes that charge upon himself, upon an account between the children, he is to be taken as having intended a benefit to the estate, and not a personal bounty to the children. *Id.* 368
10. An executor who does not render an account and swear that he has not used the fund himself, nor loaned it to others, but has kept it on hand for the purposes of his trust, is to be charged with interest from the date of his receipt of the trust money. *Arnett* v. *Linney*. 373
11. An executor who has used any part of the trust fund for his own advantage must be held to a strict interest account, unless he keeps such an account, and produces and verifies it before the Master. *Id.* 373
12. An executor who buys at his own sale, however openly or fairly, holds the property at the election of the legatee, and one who purchases in conjunction with him is subject to the same rule. *Cannon* v. *Jenkins*, 426
13. But where an executor at his own sale bid fairly, for the purpose of enhancing the price, and the property being struck off to him, sold at the same day, without collusion to one who had bid against him, altho' the executor would have held it subject to an

account, yet his purchaser, the sale being a distinct transaction acquired an absolute title. *Id.* 426

14. Sales of slaves in lots are not favored in Equity, because slaves generally sell better singly; and the person who conducts such sales does it at the peril of answering for the true value. But where the slaves are sold in families, although the executor has no right to consult his feelings at the expense of the legatees, yet he will not be charged the full value, unless the interest of the legatees is manifestly injured by the mode of sale. *Id.* 426
15. Executors are justified by sales at auction in the usual way. But if they depart from this method, and sell at private sale, they are answerable for the full value.—*Id.* 426
16. The representatives of an administrator cannot be compelled to account with any person but an administrator *de bonis non*. *Id.* 426
17. A creditor of an executor, who has taken a security for his debt upon the assets of the testator with notice, cannot hold them against the legatees. *Huson* v. *McKenzie*, 467
18. A single act of mal-administration cannot be made the foundation of a suit against an executor; but the whole administration must be inquired into, and if the frame of the bill does not permit this, it must be dismissed. *Id.* 467
19. One of several administrators, who assents to the delivery, by his co-administrator, of the assets to the next of kin, before the payment of debts, is guilty of a *devastavit*. So also, if the assets were delivered over in obedience to the decree of a Court, unless he shows that it was made *in invitum*. *McNair* v. *Ragland*, 520
20. An administrator, who has revived the suit of his intestate, need not produce his letters of administration at the hearing of the cause, it is sufficient, if he produce them when the order to revive was made. *Id.* 537

Vide *Lapse of Time*, 2, 3. *Bill of Interpleader*, 1, 2. *Statute of Limitations*, 2, 3. *Trust*, 10. *Sureties*, 4. *Interest*, 1.

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Vide *Depreciated Currency*, 3. *Interest*, 3.

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AGREEMENT.

1. A post-nuptial agreement made upon sufficient consideration between husband and wife, will be enforced in Equity. *Liles* v. *Fleeming*, 185
2. Where there was an agreement to settle property upon the wife, and the husband, by will, bequeathed that property to a stranger, it was held, the wife having dissented from the will, that her right to a child's part of the personality, could be defeated only by a satisfaction in express words, or one resulting from a necessary implication, and there being neither, that she was entitled both to the settled property and to her child's part.—*Id.* 185
3. Where a son, who died intestate, unmarried, and without issue, is bound by his agreement to support his mother, it was held, that she having succeeded to his personal estate absolutely, and to his real estate for life, had no claim against the heirs on account of their intestate in the land, expectant upon her life estate, notwithstanding she had advanced the money for the purchase of the land. *Taylor* v. *Vick*, 274
4. One who has conveyed his property in trust to secure his own debt, and has assented to a sale of it upon disadvantageous terms, cannot in Equity, obtain a re-sale of it, although it was purchased by the creditor whose debt was secured. *Haines* v. *Cowles*, 424

5. But other creditors, who have been injured by the sale, will be aided.—*Id.* 424

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ALTERATION OF WRITTEN INSTRUMENTS.

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Vide *Injunction*, 3.

ANSWER.

1. It seems, where the lapse of time forms no bar to the claim asserted, but only raises a presumption of fact inconsistent with it, the lapse of time must be relied on, in the answer, as a defence. *Nesbit* v. *Brown*, 30
2. A bill, the allegations of which are directly denied by the answer, and supported by one witness only, without corroborating circumstances, will be dismissed.—*Alley* v. *Ledbetter*, 453
3. New matter, brought forward in the answer as a defence, which would have aided the Plaintiff, had the bill been framed in reference to it, cannot be used to sustain the relief sought. *Green* v. *Branton*, 504

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ASSIGNMENT.

1. The assignor of a term for years has, in Equity, no lien upon the land for the money agreed to be paid, as the consideration of the assignment. *Norfleet* v. *Cotton*, 338

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AUCTION SALES.

1. The employment by the vendor of by-bidders, to enhance the price at an auction sale is a fraud, for which Equity will set aside the contract, on a bill filed by the purchaser at such sale. *Morehead* v. *Hunt*, 34
2. The employment of a puffer at an auction sale is a fraud upon the bidders; and a Court of Equity will direct a bond, given by a bidder for property bought under such circumstances, to be delivered up. *Woods* v. *Hall*, 415

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AWARD.

1. An award may be corrected for error in law, where it appears on its face that the arbitrators intended to decide according to Law, but have made a mistake. *Ryan* v. *Blount*, 386

BAILMENT.

Vide *Statute of Limitation*, 1. *Gift*, 2.

BASTARDS.

1. Where there are children of the same mother, some born in wedlock and some illegitimate—the former class may inherit from the latter, and the latter may inherit from each other; but the latter cannot inherit from the former, nor can the mother, in any case, inherit from the latter. *Flintham* v. *Holder*, 349

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BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where the payee of a promissory note mutilated it, by cutting off the name of the attesting witness, *held* that he was entitled to no relief in a Court of Equity. *Sharpe* v. *Bagwell*, 115
2. A bill was accepted for the accommodation of the drawer, and this fact was known to the endorser, who, when his endorsement was made, received from the drawer a bond and mortgage, conditioned to be void if he should be indemnified against that and any subsequent endorsement. The drawer then conveyed the mortgaged premises in trust, to secure all his debts, with instructions in the deed to the trustee, to pay such debts first " as may be endorsed by the said endorser." After this conveyance, the bill being protested was taken up, by giving the holder the note of the drawer, with the acceptor and the endorser as sureties, which was paid by

the acceptor, who procured an assignment of all the securities in the hands of the endorser and holder. *It was held*,

1. That there being no contract whereby the endorser and acceptor agreed to become co-sureties, the latter had no right to contribution from the former.
2. That the endorser being liable only on the default of the acceptor, the latter could not be subrogated to the rights which the holder had against the former.
3. That the mortgage being made for the personal indmnity of the endorser only, and not for the security of the *debt*, the acceptor had no right to pursue the fund, and that the endorser being indemnified by the acceptor's payment, the mortgage was *functus officio*.
4. That a mortgage to secure subsequent endorsements rested merely in contract, and was available for those only which were made while the property remained under the control of the mortgagor. *Gomez* v. *Lazarus*, 205

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BILL OF INTERPLEADER.

1. A bill of interpleader can be filed only by one in possession. Therefore where an administrator never had reduced the assets into possession, but they were in that of some of the distributees, who claimed adversely to him, a bill by him against the distributees, praying that they might interplead, is improper. *Martin* v. *Mayberry*, 169
2. But the Defendant to such bill, who claimed adversely, having answered, filed a cross bill, submitted to an account, &c. he was enjoined from computing the time, spent in this litigation, in bar of an action at law to be brought by the administrator. *Id.* 169

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COLLATERALS

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COMMISSIONS.

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CONDITIONAL SALES.

1. Where, upon the face of a transaction, it is doubtful whether the parties intended to make a conditional sale, or a mortgage, Courts of Equity incline to consider it a mortgage: because by means of conditional sales, oppression is frequently exercised over the needy. *Poindexter* v. *M'Cannon*, 377
2. But there is no rule of Equity, which forbids the making of conditional sales. And where the subsequent acts of the parties are consistent with the idea of a sale, a redemption is not decreed. For altho' the acts of the parties are never regarded at law as a rule of correction, yet in equity they are considered as evidence of the intent. *Id.* 377

3. Where upon the purchase of a slave, a full price was paid, and no bond or covenant taken for the payment of the purchase money, in case of the death of the slave and possession was given immediately, *held*, that these circumstances, added to the fact that the buyer was necessitous, and that twelve years had elapsed before redemption was claimed, proved that a clause, whereby the seller reserved to himself the power of annulling the bargain, did not render the transaction a mortgage, but a conditional sale, to claim the benefit of which there must be a strict performance by the seller. *Id.* 377

CONFISCATION ACTS.

1. The treaty of 1783 revived the rights of British creditors and restored them the right to sue, as if the confiscation acts had not been passed. The war of 1812, there being no new confiscation acts, did not affect those rights, otherwise than to suspend the right of suing. *McNair* v. *Ragland.* 520
2. Whatever may be the effect of the treaty of 1783 upon the mutual rights of copartners, where the whole partnership property, or a portion of it, belonging to an alien partner, was seized under the confiscation laws, yet where the copartnership owed the alien partners for advance, the resident partner's share of these advances constituted, in Equity a debt, which he owed his copartners, and which is within the treaty. *Id.* 520

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CONTRIBUTION.

Vide *Sureties*, 1, 2, 3, 4. *Bills of Exchange*, 2. *Mortgage*, 3, 4, 5.

CONTRACTS.

1. An executory contract, made in consideration of an intended marriage, whereby the parties covenant to make a provision for an illegitimate child of the wife, will, under the act of 1799, be protected in a Court of Equity—and its specific execution enforced, in favor of such a child, against the husband. *Kimbrough* v. *Davis*, 71

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1. It seems, where a claim is asserted on the part of infants, who have an appearance of right, each party must pay his own costs.—*Kirk* v. *Turner*, 14
2. Upon the removal of an Equity cause to this Court, under the act of 1818 (*Rev. c.* 962) the original papers are to be sent here ; and if the Clerk below sends copies of them, the costs of the copies cannot be taxed. *Lee* v. *Norcom*, 376

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COUNTY COURT.

Vide *Jurisdiction*, 4, 5.

COVENANT.

1. Where one sells the land of another, setting out the title of the latter, and covenanting against it, no estate passes by the deed, and a second vendee cannot sue at Law, in his own name, on the covenants. *Nesbit* v. *Brown*, 30
2. Where a vendor covenanted, in case of eviction, to pay double the purchase money, and also damages, it was held to be a penalty, not stipulated damages, and the purchase money and interest only could be recovered. *Id.* 30

CREDITORS.

1. A creditor, who takes an incumbrance to secure an antecedent debt, without releasing a surety, is not such a purchaser as is pro-

tected by want of notice *Donaldson* v. *Bank of Cape Fear*. 103

2. A mere creditor, who has not obtained a lien by judgment, has no right to the aid of a Court of Equity, to follow the property of his debtor *Id.* 103

3. Where lands conveyed to D, M, & Co., and also to M, in trust for D, M, & Co., were conveyed by M, who died insolvent, indebted to the company, and without personal representation, to secure his individual debt, it was held, upon a bill filed by a creditor of the copartnership, to subject this property:

1. That the creditor of M, was not a purchaser for value, within the meaning of the rule which protects them when they are not affected with notice.

2. That nothing passed by the deed, in the land conveyed to D, M, & Co.

3. That no decree could be made founded on the fact that M was a debtor to the company, until his estate was represented.

4. That the Plaintiff not having established his demand, and having no lien, had no right to the assistance of a Court of Equity.—*Id.* 103

5. Where there are two creditors, one of whom can obtain satisfaction only from the visible property of the debtor, and the other can subject not only that, but a special fund created for this indemnity; although a Court of Equity will compel the latter to resort to the special fund, or will subrogate the first to his right to that fund, yet the first creditor must demand this, before the latter has received satisfaction from the visible property. If he waits, he has no Equity against a third creditor, who obtains an assignment of the special fund. *Williams* v. *Washington*, 137

6. In Equity, a surety, in respect to his liability, is regarded as a creditor, and has a right to all the privileges of one. *Id.* 137

7. A surety, has, in respect to his liability, the rights of a creditor, and upon the insolvency of the principal debtor may retain any funds belonging to him in his hands. *Williams* v. *Helme*, 151

8. Therefore, where the surety owed the principal debtor, who became insolvent, and assigned for value the debt due by the surety, *held*, that the latter might retain the amount of his subsequent payments against the assignee. *Id.* 151

9. Before the passage of the act of 1812, a Court of Equity lent its aid to an execution creditor, to subject an equity of redemption subsisting in favor of the Defendant to the satisfaction of the execution. It will do so still, especially as the remedy is not so perfect at Law, as it can be made in this Court, by ascertaining before a sale, the amount of the debts charged upon the land. *Harrison* v. *Battle*, 541

10. A creditor must establish his debt at Law, to entitle himself to the aid of a Court of Equity. But a return of *nulla bona* is unnecessary, where it appears that all the debtor's property has been placed beyond the reach of final process. *Id.* 541

Vide *Lien*, 4. *Statute of Limitations*, 2. *Agreement*, 4, 5. *Mortgage*, 7. *Trust*, 2, 3. *Widows*, 2.

CYPRES.

Vide *Trust*, 5, 6.

DAMAGES.

Vide *Covenant*, 2.

DEBTS.

Vide *Legacies*, 3, 4.

DEED.

1. A delivery of a deed is a parting with the possession of it by the grantor in such a manner as to deprive him of the right to call it. *Kirk* v. *Turner*, 14

2. Where a deed was handed to the subscribing witness as the agent of the grantor, for the purpose of being proved, and was by the agent returned to the grantor without being proved, *held*, that this was not a delivery. *Id.* 14

Vide *Covenant*, 1. *Grant*, 1. *Husband and Wife*, 5.

DELIVERY.
Vide *Deed*, 1, 2.

DEPOSITIONS.
Vide *Practice*, 7.

DIVORCE.
1. For adultery, the Court *may* divorce *a vinculo matrimonii*, but is not bound to do so. It will in its discretion either dissolve the marriage, or decree a separation of the parties. *Collier* v. *Collier*, 356
2. Where a husband admits his wife to conjugal embraces, with knowledge that she has committed adultery, he may notwithstanding seek a divorce for her subsequent misconduct. *Id.* 356

DEPRECIATED CURRENCY.
1. A debt existing before the depreciation in the currency which took place during the revolutionary war, might have been discharged in that currency. But if not paid or tendered during that period, upon the subsequent resumption of cash payments, the whole sum is to be paid without reference to the depreciation.—*McNair* v. *Ragland*, 520
2. A debt contracted while the currency was depreciated, upon the resumption of cash payments, must be discharged according to the rate of depreciation at the date of the contract. *Id.* 520
3. But an agent, charged with the collection of debts, is responsible only for what he collects; and if he received a debt in the depreciated currency, upon a settlement made after the resumption of cash payments, is to account only for the value of the currency at the time it was received.—*Id.* 520
4. And where a collecting partner owed a debt to the co-partnership, contracted before the revolutionary war, and also collected money due to the co-partnership during the depreciation of the currency, upon a settlement of his accounts, allowance was made for the depreciation upon money collected, but not upon the debt due from himself. *Id.* 520

DEVASTAVIT.
Vide *Administrators and Executors*, 20.

DEVISE.
1. In a devise of personalty, "to be equally divided between my son P, my daughters D, C, & E, and the heirs of my daughter P," *held* that the latter took but one-fifth among them. *Ricks* v. *Williams*, 3
2. A testator directed his land to be sold, and the proceeds divided among his "heirs not heretofore mentioned." Held, 1st, that the land should be considered as money, and that the word *heirs* meant those entitled under the statute of distributions. 2d. That the words *not heretofore mentioned* applied only to those taking beneficially under the will, and not to a legatee in trust.—*McCabe* v. *Spruill*, 189

Vide *Legacies*, *Trust*, 7, 10.

DISCOVERY.
Jurisdiction, 10, 11. *Partners*, 2. *Possession*, 1.

DOWER.
1. Where the vendee of lands received no title, but only a bond to make one upon the payment of the purchase-money, the dower of his wife in the land is not protected against the debt due the vendor for the purchase-money. Is the wife entitled to dower at all? *Qu.* *Kirby* v. *Dalton*, 195

ELECTION.
Vide *Legacies*, 8.

EQUITY OF REDEMPTION.
Vide *Trust*, 4, 21. *Creditors*, 8.

EVIDENCE.
1. In Equity, an admission in the plea may be used by the Plaintiff against the Defendant. *McNair* v. *Ragland*, 537

EXCEPTIONS.
Vide *Practice*, 1, 2.

EXECUTIONS AND EXECUTION SALES.
Vide *Administrators and Executors*, 5, *Trust*, 19, 20, 21, 22.

EXECUTORS.
Vide *Administrators and Executors.*

FEME COVERT.
Vide *Husband and Wife.*

FRANCHISE.
Vide *Roads*, 1.

FRAUD.
1. Morality and good faith require, that the vendor should disclose to the vendee every circumstance which may induce the latter to change his mind as to the contract. *Alston* v. *Outerbridge*, 18
2. Where a trustee sold at auction a *fee simple* in the trust land, and before the execution of the contract the trustee and the *cestui que trust* discovered that the deed of trust created only a life estate, *held* that the concealment of this discovery was fraudulent, and vacated the contract, although the deed of trust was publicly read, and the trustee only undertook to convey the title he had, and although the *cestui que trust* refused to guaranty the title of the trustee. *Id.* 18
3. It seems that fraud practised by a *cestui que trust* will avoid a sale honestly made by the trustee.—*Cheshire* v. *Booe*, 22
4. A misrepresentation by the vendor of a fact which materially affects the value of the property sold, and of which the vendee is ignorant, avoids the sale. *Woods* v. *Hall*, 415
Vide *Auction Sales*, 1, 2. *Widows*, 2. *Voluntary conveyances*, 2. *Creditors*, 1, 2, 3. *Mortgages*, 2. *Notice*, 1, 2, 3. *Marriage settlement*, 1, 2, 4. *Trust*, 15. *Husband and Wife*, 6, 7, 8. *Mistake*, 1, 2.

GAMING.
1. Upon the construction given to the act of 1788 (*Rev. C.* 284) for avoiding securities given upon a gaming consideration, money lost and paid cannot, at Law, be recovered back. *Dunn* v. *Holloway*, 326
2. Therefore, Equity will not interpose to restrain the collection of a judgment, obtained on a bond void under that Statute, unless the judgment was obtained by a fraudulent circumvention of the Defendant at Law. *Id.* 326

GIFT.
1. Where a father, upon his daughter's marriage, before the act of 1806, sent home property with her, it was presumed to be a gift as between the parties, and should be taken as such in favor of creditors. *Collier* v. *Poe*, 55
2. But a declaration to the daughter accompanying the delivery, that a loan and not a gift was intended, is sufficient to rebut the presumption, and convert the husband into the father's bailee, although such declaration was unknown to the husband. *Id.* 55
Vide *Voluntary Conveyances*, 2, 3. *Slaves*, 1, 2, 3.

GRANT.
1. Although a misdescription of land, as to the County in which it lies, would not vitiate in a deed between individuals, it seems that a similar mistake in a grant would avoid it even at Law; because the grant is founded upon an entry and survey, which are to be made by sworn officers in the very County mentioned. *Lunsford* v. *Bostion*, 487
2. But if such misdescription in a grant does not avoid it, clearly an entry made in one County, when the land lies in another, is void. And a Court of Equity will not compel another person, who made an entry and obtained a grant of the same land, with notice of the former defective entry, to convey to the first enterer. *Id.* 487
3. Where the Plaintiff averred, that land entered by him was situate in one County, where he made his entry, and that the Defendant had, with notice of his entry, obtained a grant for the same land

upon an entry, made in another County, *held*, that if the land did lie in the County, where the Plaintiff's entry was made, his title was purely legal, and the remedy at Law completed.—*Id.* 183

Vide *Notice*, 1, 2.

GUARDIAN AND WARD.

Vide *Interest*, 1, 2.

HEIRS.

Vide *Devise*, 2. *Legacies*, 5, 6. *Statute of Limitations*, 2. *Bastards*, 1.

HUSBAND AND WIFE.

1. Where land was sold for partition under the act of 1812, and the share of the *feme covert* paid to the husband, a Court of Equity will decree her an indemnity against him. *Bryan* v. *Bryan*, 47
2. A *feme covert* being thus entitled, *held*, that she could, by her next friend, maintain an adversary suit against the administrator of an infant *propositus* and her husband, and that the fund was not liable for the debts of the latter, either to the administrator or the intestate. *Id.* 47
3. In this State, no settlement being made on the marriage, the wife has no equity against her husband, he being insolvent, for a provision out of her *choses* accruing during the coverture.—*Id.* 47
4. Where land is sold for the purpose of partition, the share of a *feme covert* in the proceeds is considered as realty, and cannot be paid to her husband, except she directs it on a private examination. *In the matter of James Dozier's heirs*, 118
5. A married woman can be bound as to her land, there being no separate estate, only by her deed executed in the prescribed form, or the decree or judgment of a Court; and if her deed be informal it cannot be aided. *Green* v. *Branton*, 504
6. Where the husband, with the wife's privity and consent, sold her land, and she received and enjoyed the purchase money, upon her bill to be relieved against an obstacle to her, in asserting her right to the same land, her fraudulent conduct does not bar her—and an outstanding legal estate, which otherwise she had a right to have removed, will not be held up as a security for the purchase-money. *Id.* 504
7. A wife is in all cases barred by a judgment against her husband and herself, obtained during the coverture, unless obtained by a combination between the other party and the husband, in fraud of the wife's rights; and if the husband, for his own convenience, declines to defend the suit, the wife cannot have the judgment reversed, simply because it was unjust.—*Id.* 504
8. As where the husband and wife were served with a *sci. fa.* to subject her land to her father's debt, and the husband, without collusion with the Plaintiff, or the administrator, declined defending her interest—*held*, that the wife was barred by the judgment.—*Id.* 504
9. Where a husband received with his wife a large personal estate in possession, during the coverture, and afterwards induced her to join him in a conveyance of her land to a third person, who reconveyed it to the husband, and the conveyance and re-conveyance were only designed to vest the fee in the husband, *held*, upon a bill filed by the husband as administrator of his wife to recover chattels of which she was the *cestui que trust*, that the children of the wife by a former marriage had no equity to prevent his obtaining the legal title to those chattels. *Jasper* v. *Maxwell*, 361

Vide *Lien*, 2. *Agreement*, 1, 2. *Divorce*, 1, 2. *Trust*, 13. *Marriage Settlement*, 3, 5.

INCUMBRANCE.

Vide *Trust*, 4.

INFANTS.

Vide *Costs*, 1. *Partition*, 1. *Administrators and Executors*, 2. *Trust*, 1.

INJUNCTION.

1. Injunctions are not awarded by Courts of Equity for the infringement of doubtful rights, until they have been established at Law. But when the right is clear, and the injury irreparable, an injunction will be awarded, although the right has not been established at Law. *Att'y. General* v. *Hunter*, 12
2. Where a bill charged that the Defendant's mill dam injured the health of the relators, an injunction was perpetuated, notwithstanding the Defendant had been indicted for the same nuisance, on which there had been a mistrial, and although the indictment was still pending. *Id.* 12
3. It is an error to say that an injunction is of course waived by an amendment. But an injunction is never propped by an amendment. *Barnes* v. *Dickinson*, 330
4. An injunction is not dissolved, of course, upon the coming in of the answer, in which the Plaintiff's whole case is denied. The statement of the Defendant must be at least credible.—Any evasion in not responding to the material charges in the bill, or an extreme improbability in the statement of the Defendant, will induce the Court to retain the injunction. *Moore* v. *Hylton*, 433

Vide *Mortgage*, 7. *Bill of Interpleader*, 2.

INTENT.

Vide *Legacies*, 9, 10. *Residuary Clause*, 1. *Parol Evidence*, 1. *Marriage Setttlement*, 1.

INTEREST.

1. Interest is not of course to be compounded in favor of a ward against the executors of his guardian, but simple interest only is to be computed from the death of the latter, unless compound interest was received. *Ryan* v. *Blount*, 386
2. Ordinarily a guardian is to be charged with compound interest; but he may be exempted from it by proving that, after suitable exertions, he was unable to realise it. *Id.* 386
3. A debtor is liable to pay interest, by virtue of his contract, whether he made it or not. An agent or trustee is liable, only because he made it, or might have made it, but for gross neglect. As where a collecting partner, in obedience to the confiscation acts, *bona fide* paid the share of his alien partner into the treasury, it was held, that whatever may be the effect of the treaty upon such payment of the principal debt, the collecting partner was not liable for interest thereon. *McNair* v. *Ragland*, 520

Vide *Administrators and Executors*, 8, 10, 11.

INTERLOCUTORY DECREE.

Vide *Rehearing*, 1.

JUDGMENTS AT LAW.

Vide *Jurisdiction*, 7, 8. *Gaming*, 2. *Mortgage*, 7. *Husband and Wife*, 7, 8.

JURISDICTION.

1. The Jurisdiction of the County Courts as Courts of Equity, being confined to suits for distribution, they have no power to make any order in such suits, which is not necessary to a correct decision. *Kennon* v. *Branson*, 64
2. Therefore, in a petition for distribution, where the administrator and intestate had been copartners, and upon a reference of the partnership and administration accounts, a balance was reported against the estate—*held*, that this only formed a *defence* against the suit—and that a decree against the next of kin for such balance was erroneous. *Id.* 64
3. Whether a Court of general Equity jurisdiction could decree the Plaintiff to pay a balance against him? *Qu.—Id.* 64
4. For the recovery of legacies,

filial portions and distributive shares, the County Courts are Courts of Equity, and have all the powers of such Courts. Upon proper cases, they may review or rehear their own decrees. But where a decree was made which disposed of the cause, it was held to be equivalent to an enrolment, and that they had no power, at a subsequent term, to rehear that cause *Simms* v. *Thompson*, 197

5. A review cannot be had for mistakes in a decree, which might have been rectified by proper attention. *Id.* 197
6. Where a party had an adequate legal remedy, and has brought an action and failed in it, he has no right to the aid of a Court of Equity. *Barnes* v. *Dickinson*, 273
7. A Court of Equity will not relieve against a judgment at Law, unless the Defendant was ignorant of the fact in question pending the suit, or it could not be received at Law, as a defence.—*Peace* v. *Nailing*, 289
8. Courts of Equity do not allow appeals to them, merely to obtain a new trial. And where a party, on being sued at Law, attempted to establish a legal defence before the jury, and was unsuccessful, he cannot on the same facts obtain relief in Equity. *Id.* 289
9. After a failure at Law, the party cast cannot come into a Court of Equity, merely because the verdict is unjust; unless the matters alleged in Equity do not constitute a defence at Law. *Alley* v. *Ledbetter*, 453
10. Where a discovery in aid of a defence at Law is sought from the conscience of the Defendant, it ought to be obtained pending the suit at Law. *Id.* 453
11. Discovery and relief are never given after a trial at Law, where the matter averred was available at Law, unless the party seeking it avers and proves, that he was ignorant of the defence or evidence, at the time of the trial.—*Id.* 453
12. A Court of Equity will not, upon a dispute respecting the title to church property, decide a religious controversy between its members. *Organ Meeting House* v. *Seaford*, 458
13. Upon a bill filed in this State, to enforce a decree made in South Carolina, *held*, Taylor, Chief-Justice, *dissentiente*, that the Courts of this State have a right to examine into the merits of the decree as upon a bill of review. *Picket* v. *Johns*, 123
14. Where a resident of South Carolina, upon separating from his wife, gave her a *post mortem* bond for her own benefit, and that of their children, and died in South Carolina, having voluntarily conveyed land in this State to illegitimate children, *held*, Taylor, Chief-Justice, dissenting, that a decree of the Chancery of South Carolina, declaring this conveyance to be void against the wife and children, was a nullity, the subject matter being without its jurisdiction. Whether the land conveyed to the children is liable to be taken in satisfaction of the bond? *Qu?* *Id.* 123
15. In such a case it seems that subsequent advancements, made by the father to children provided for in the bond, are considered a satisfaction of it *pro tanto;* and it is clear, that land charged with the payment of his debts is to be exhausted, before a Court of Equity will subject property conveyed, or bequeathed to the illegitimate children. *Id.* 123

Vide *Review*, 1. *Creditors*, 3, 9. *Injunction*, 1, 2. *Grant*, 3.

LAPSE OF TIME.

1. Although lapse of time is no bar to an express trust, yet payment or other satisfaction may be presumed from it. *Ivy* v. *Rogers*, 58
2. Where an administrator, two years after his qualification, made a return to the County Court admitting a balance against him, a bill filed twenty years afterwards by the next of kin, for that balance, without accounting for the delay, is too late. *Id.* 58
3. It seems, that the return alters

the relation between the administrator and the next of kin, and divests the former of his character of trustee. *Id.* 58

4. Any delay in suing, which can be satisfactorily accounted for by the course of public events, will not be construed into an abandonment or satisfaction of the plaintiff's demand. *McNair* v. *Ragland*, 537

Vide *Pleading*, 1. *Answer*, 1. *Trust* 1. *Administrators and Executors*, 6. *Possession*, I.

LEGACIES.

1. A bequest of a negro of a particular description, with a direction to the executor to purchase one, rather than divide families, is a pecuniary legacy. *White* v. *Beattie*, 87

2. Although specific legacies do not abate in favor of those which are pecuniary, yet where the testatrix bequeathed *all* her property specifically, and directed two negroes to be purchased for A. and B., *held*, upon a deficiency of assets, that all the legacies must abate ratably. *Id.* 87

3. A legacy which is equal to, or larger in value than a debt due by the testator to the legatee, is *prima facie* a satisfaction of the debt. *Ward* v. *Coffield*, 108

4. Where A devised all his North Carolina property to his son B, and all his Tennessee property to his son D, a resident of Tennessee, and charged all his debts due in North Carolina upon the devise to B, a debt due to D less than the legacy to him, was held to be satisfied by it. *Id.* 108

5. The word *heirs*, in a will, where the testator recognizes the existence of the ancestor, means *heirs apparent*. In a bequest to J. P. and the heirs of S., J. P. takes a moiety. *Jourdan* v. *Green*, 270

6. In such a bequest to heirs, if it be of a present interest, those only take who are born at the date of the will, and perhaps at the death of the testator. But if the interest is expectant upon a life estate, those take who are born before the expiration of the particular estate. *Id.* 270

7. A testator bequeathed a large estate in land and slaves to his son, and by a subsequent clause of his will, gave one of the same slaves to his daughter. *Held*, that the legatees took the slave by moieties. *Field* v. *Eaton*. 283

8. The son claimed the slave by a gift prior to the will; but as he had taken other property under the will, *held*, that he had made his election, and could not claim against it. *Id.* 283

9. There being no *latent* ambiguity, but plain contradictory bequests, *held*, that parol evidence was inadmissible to prove the testator's intention to give the property to his son. *Id.* 283

10. Where there is no *latent* ambiguity, but plain contradictory bequests, parol evidence of the testator's intention is inadmissible. *Id.* 283

11. Specific legacies do not abate upon a deficiency of assets, unless all the property of the testator be specifically bequeathed. *White* v. *Beattie*, 324

12. But where the testator does not give away the whole of his property specifically, and what is left is afterwards consumed or destroyed by the testator or his executor, this circumstance will not make the specific legacies abate. *Id.* 324

13. It seems, that to determine whether a specific legacy shall abate or not, evidence of the state of the assets *dehors* the will may be received. *Id.* 324

Vide *Administrators and Executors*, 2, 4, 5, 14, 17. *Devise*, *Trust*, 5, 6, 7, 12, 14.

LETTERS OF ADMINISTRATION.

Vide *Administrators and Executors*, 21.

LIABILITY.

Vide *Sureties*, 1, 2, 3.

LIEN.

1. The vendor has a lien for the purchase-money upon the land

sold, against volunteers and purchasers with notice. *Wynne* v. *Alston*, 163

2 It seems, that a creditor who takes a lien for an antecedent debt, is not entitled to the privileges of a purchaser. *Id.* 163

Vide *Dower*, 1. *Agreement*, 3. *Assignment*, 1. *Trust*, 22.

MARRIAGE SETTLEMENT.

1. Where a marriage settlement does not conform to the intention of the parties, either through mistake, or the fraud of one of the parties, it will be corrected by a Court of Equity. *Scott* v. *Duncan*, 407
2. Where, however, the correction interferes with the rights of the husband or wife, or issue of the marriage, it will be made with more caution, than where it affects collaterals only, who are strangers to the consideration of the deed. *Id.* 407
3. A marriage settlement, which does not conform to the intention of the wife, will not be annulled, so as to leave the property subject to the legal rights of the husband; but it will be reformed by inserting the omitted provision, upon the same principles on which articles are executed.—*Id.* 407
4. Collaterals, who claim under a settlement procured by the fraud of their father, are excluded from any benefit under it, upon its being reformed. *Id.* 407
5. An agreement by parol, made before the act of 1819 (*Rev. C.* 1016) by a father, in consideration of the marriage of his illegitimate daughter, to settle all his estate upon her husband, herself, and the issue of the marriage, is binding; and although it does not attach specifically upon any portion of the father's property, so as to defeat a purchaser with notice, yet it will be enforced against volunteers claiming under him. For though the relation between the father and the illegitimate daughter is not sufficient to raise a use, yet the intervention of the husband extends to the wife and the issue. *Wall* v. *Scales*, 476
6. In executing such an agreement, care will be taken of the interest of the issue—and the husband submitting, the estate was limited to him for life, with a power to make advancements upon the marriage or full age of the children; with remainder to the issue as tenants in common, and cross remainders between them upon their death under age and unmarried. *Id.* 476

Vide *Contracts*, 1. *Agreement*, 1, 2.

MARSHALLING.

Vide *Creditors*, 10.

MILLS.

Vide *Injunction*, 1 2.

MISDESCRIPTION.

Vide *Grant*, 1, 2, 3.

MISTAKE.

1. Equity relieves against mistakes, as well as against fraud in a deed or contract in writing; and parol evidence is admissible to prove the mistake, though it is denied in the answer; and this where the Plaintiff seeks relief affirmatively on the ground of mistake. *Newsom* v. *Bufferlow*, 383
2. As where the owner of two adjoining tracts of land, having sold one of them, in describing the metes and bounds in a deed executed to the purchaser, by mistake included both tracts. The proof of the mistake being perfectly satisfactory, the vendee was decreed to re-convey to the vendor the tract of land not intended to be conveyed. *Id.* 383

Vide *Award*, 1. *Marriage Settlement*, 1, 2. *Grant*, 1.

MERGER.

Vide *Partners*, 2.

MONEY CONSIDERED AS LAND.

Vide *Lien*, 1, 2. *Husband and Wife*, 1, 2, 4. *Devise*, 2. *Partition*, 1.

MORTGAGES.

1. A subsequent mortgagee, whose

deed is duly registered, is bound by a prior unregistered one, of which he had notice. *Pike* v. *Armstead*, 110

2. If a mortgagee, for the purpose of keeping up the mortgagor's credit, suffers his deed to remain unregistered, it seems not to be fraudulent *per se*; but its character depends upon the intent. It is not fraudulent as to one who knows the whole transaction.—*Id.* 110

3. Where the lands conveyed in mortgage were sold by the mortgagor in separate parcels, the first vendee has no equity to marshal the whole mortgage debt upon a second—the latter having no notice of the purchase of the first.—*Stanly* v. *Stocks*, 318

4. If the second vendee had notice of the purchase of the first, would that fact alter the rule? *Qu.* *Id.* 318

5. But where the first vendee paid his purchase money in extinguishment of the mortgage, and the second did not, *held*, upon an adjustment of the loss between them, that the payment of the first was to be estimated in his favor. *Id.* 318

6. In equity, upon a bill by the mortgagor to redeem, he shall have relief, though at Law the estate of the mortgagee is barred; as upon a disseisin and seven years' possession with color of title. *Benzein* v. *Robenett*, 448

7. A judgment creditor is not affected by notice of a prior unregistered mortgage, and is in this respect, distinguished from the vendee of the mortgagor himself. Therefore the Court will not enjoin such creditor from selling the mortgaged premises, under his execution. *Davidson* v. *Cowan*, 470

Vide *Creditors*, 1. *Bills of Exchange*, 2. *Trust*, 4. *Conditional Sales*, 1, 2, 3. *Practice*, 6.

NOTICE, PURCHASER WITH AND WITHOUT.

1. Where a grant is obtained, with knowledge of the fact that the land had been before granted such grant is void, and will be vacated in Equity. Where this state of facts appears, the Court will act, although the party entitled to relief is made Defendant with the fraudulent grantee, especially where the bill was filed many years ago, when our Equity system was imperfect, and the practice little understood. *Benzein* v. *Lenoir*, 225

2. Where such fraudulent grant has been recently obtained, the Court will entertain a bill to vacate, *quia timet*; *a fortiori*, where possession has been had had under it, so as to bar or cloud the title at Law, and will not only vacate the grant, but direct a re-conveyance. *Id.* 225

3. It is no defence that the fraud was not intended for the person upon whom it has taken effect; for if fraud exists, the party practising it shall not be protected against any who are thereby injured. *Id.* 225

Vide *Creditors*. 1, 2. *Mortgage*, 1, 2, 3, 4, 5. *Trust*, 8. *Practice*, 5, 7. *Grant*, 2, 3. *Partition*, 2, 3. *Marriage Settlement*, 5.

NUISANCE.

Vide *Injunction*, 1, 2.

PAROL EVIDENCE.

1. Parol evidence is inadmissible to prove, that the intention of the testator was not properly expressed in the will; or that he used words, the meaning of which he did not understand. *Reeves* v. *Reeves*, 390

Vide *Legacies*, 9, 10, 13. *Statute of Frauds*, 1. *Mistake*, 1, 2.

PARTIES TO A SUIT.

1. Where a Plaintiff seeks to enforce an equity against Law, he can have no relief unless the person who has the legal title be a party to the suit. *Jones* v. *Jeffreys*, 496

2. A bill brought by some of the persons entitled under the residuary clause in a will, without making the others Defendants, or accounting for the omission, cannot

be supported. *Husen* v. *McKenzie*, 467
Arendell v. *Blackwell*, 358
Vide *Wills*, 2. *Administrators*, 19. *Statute of Limitations*, 4.

PARTITION.

1. Where land was sold for partition under the act of 1812, the share of a minor not being vested according to the act, a Court of Equity will follow the property, and decree it to an heir against an administrator. *Bryan* v. *Bryan*, 47
2. In a partition under the act of 1787, a charge of money upon the more valuable dividends, for equality of partition, is a *legal* charge upon the *land*, and follows it in the hands of a purchaser for valuable consideration without notice. *Wynne* v. *Tunstall*, 23
3. Money thus charged is realty as much as the land for which it is the substitute; and where it was allotted to the share of a *feme covert*, and the husband had taken a bond and given a receipt for it, held, that the husband and wife could recover the amount for her use. *Id.* 23

Vide *Lien*, 1. *Husband and Wife*, 1, 4.

PARTNERS.

1. A deed to a copartnership vests the property in the firm, not in the individual members. Each takes an entirety, and by his own deed, can only convey his right to the residue after a settlement of the partnership accounts. *Donaldson* v. *Bank of Cape Fear*, 103
2. Where upon a contract by copartners, made in Virginia, the bond of one was taken to secure the partnership debt, *held*, that if by the law of that State, the contract be joint, the execution of the bond extinguished the debt; if joint and several, that it was no merger of the simple contract debt against the other partners; and as the creditor had a plain remedy against them at Law, a Court of Equity could not aid him further than by a discovery; and this, although he averred that the bond was executed in the copartnership name by one copartner, in ignorance on his part, that it did not bind the copartnership. *Spear* v. *Gillet*, 470

Vide *Jurisdiction*, 3. *Creditors*, 3. *Depreciated Currency*, 4. *Confiscation*. 2. *Statute of Limitations*, 5, 6. *Interest*, 3.

PAYMENT.

Vide *Legacies*, 3, 4. *Trust*, 1. *Agreement*, 3. *Depreciated Currency*, 1, 2, 3, 4. *Lapse of Time*, 4.

PENALTY.

Vide *Covenant*, 2. *Usury*, 1, 2, 3, 4.

PLEAS.

Vide *Practice*, 9.

PLEADING.

1. A bill should contain only a statement of facts on which the Plaintiff's case is founded, not the evidence of those facts; therefore, where lapse of time forms no bar to the claim, but only raises a presumption of fact inconsistent with it, the lapse need not be accounted for in the bill. *Nesbit* v. *Brown*, 30

Vide *Answer*, 1, 2, 3. *Bill of Interpleader*, 1.

POSSESSION.

1. Where the Plaintiff charged that the Defendant held slaves as his trustee, and prayed an account of the profits, and that the possession might be surrendered to him, and the Defendant denied the trust, and insisted that he had held possession twenty-six years adversely to the right of the Plaintiff, and there was no proof of the trust—*held*, even if the Court had jurisdiction for a discovery or an account, that as the possession of the Defendant was a bar to an action at Law—by analogy it was a bar to the relief. *Mardre* v. *Leigh*, 364

Vide *Gift*, 1. *Widows*, 1.

POSSESSION WITH COLOR OF TITLE.

Vide *Mortgages*, 6.

PRACTICE.

1. Exceptions to a report, upon a reference to take an account, are unnecessary when the Master assigns unsatisfactory reasons for his conclusions. *Hooks* v. *Sellers*, 61
2. It seems, that a bill to correct errors in an account, is, in its nature, an exception, and to a report on such a bill stating a new account, none need be filed. *Id.* 61
3. Where a replication is taken to an answer, the answer is not evidence, unless responsive to the bill. Therefore, where the Plaintiff charged one assignment, and the Defendant denied that, and set up another, and no proofs were taken —*held*, that the case was to be considered without reference to either. *Johnson* v. *Person*, 368
4. A reference to the Master to take an account need not be renewed at every term between the order and the report. *Id.* 368
5. If a party to a bill for an account reside out of the State, and has no known agent to attend to the suit, it is proper to serve notice of taking the account upon his Counsel in this Court. *Id.* 368
6. Upon a bill to foreclose or redeem a mortgage, its existence being admitted, a reference for an account of the amount due upon it is an order of course. Questions respecting that amount properly belong to the account, and are only heard upon exceptions to the report. *Blackledge* v. *Nelson*, 415
7. On the hearing of an original bill, in the nature of a supplemental bill, and bill of revivor, depositions taken in the original suit may be read. *Benzein* v. *Robenett*, 448
8. A reference is never made to establish a fact put in issue by the pleadings; but always relates to some matter supplemental to the relief granted at the hearing. *Lunsford* v. *Bostion*. 487
9. In Equity an admission in the plea may be used by the Plaintiff against the Defendant. *McNair* v. *Ragland*, 537
10. A cause which has been prematurely removed to this Court, must be remanded at the costs of the party removing it. *Taylor* v. *Dickens*, 71
11. No decree can be made against one on whom process has not been served, unless he has entered an appearance. *Ryan* 4. *Blount*, 386
12. A guardian shall not be permitted to prosecute a suit against his ward. *Smith* v. *Dudley*, 358

Vide *Bill of Interpleader*, 1, 2. *Notice*, 1. *Injunction*, 4. *Sci. fa.*, 1. *Administrators*, 18, 21. *Re-hearing*, 1. Answer, 1, 2, 3. *Costs*.

PRIORITY.

Vide *Mortgage*, 1. *Creditors*, 4. *Notice*, 1, 2.

PUFFERS.

Vide *Auction Sales*, 1.

PURCHASERS.

Vide *Creditors*, 1, 3. *Lien*, 1, 2, 3, 4. *Mortgage*, 3, 4, 5. *Administrators*, 5, 12, 13, 17. *Dower*, 1.

REFERENCE TO THE MASTER.

Vide *Practice*, 4, 6, 8.

REGISTRATION.

Vide *Mortgages*, 2, 7. *Trust*, 8. *Voluntary Conveyances*, 4.

RE-HEARING.

1 A petition for a re-hearing is the proper remedy against an interlocutory decree. *Ricks* v. *Williams*, 3

Vide *Jurisdiction*, 4.

RELEASE.

Vide *Administrators*, 7.

RELIGIOUS SOCIETIES.

Vide *Jurisdiction*, 12.

REMAINDER.

Vide *Administrators*, 4.

RELIEF.

1. Where a contract is declared to be void, the parties are remitted to their original rights; and where a Court of Equity aids in restoring them to those rights, it confines itself to restitution merely, and never decrees damages for a loss. *Ellis* v. *Ellis*, 402

2. Upon a parol contract for the sale of land, the bond of a third person was assigned, in payment of the purchase-money, to the vendor, at the instance of the vendee, by one who was not a party to the contract, the obligor in which was insolvent at the time of the assignment. Upon a decree declaring the contract to be void, as the vendee could, at Law, recover neither the bond nor the money, the Court lent its aid; but proceeding on the principle of restitution merely, they ordered a judgment upon the bond in favor of the vendor, to be assigned to the vendee.—*Id.* 402

Vide *Sci. fa.*, 1. *Creditors*, 8. *Bills of Exchange*, 1. *Jurisdiction*, 7, 8.

REMOVAL.

Vide *Costs*, 2.

RE-PAYMENT.

Vide *Specific Performance*, 1, 2.

RESIDUARY CLAUSE.

1. Every testator is presumed not to die intestate as to any part of his estate. Therefore, a residuary clause, unless expressly restrained, always passes whatever is not otherwise disposed of. *Reeves* v. *Reeves*, 390

RESTITUTION.

Vide *Relief*, 1, 2.

RESULTING TRUST.

Vide *Trust*.

REVIEW.

1. Whether a bill to review a decree of this Court can be filed in the Court below? *Qu.* *Barnes* v. *Dickinson*, 330

2. A bill of review for newly discovered testimony cannot be sustained, if the discovery was made in time to have been brought forward in either an amended or supplemental bill. *Id.* 330

Vide *Jurisdiction*, 4, 5.

ROADS.

1. Where the Legislature authorized one to open a road and collect tolls on it, a subsequent authority for a similar purpose to another is valid, although it may diminish the profits of the first road. *Allen* v. *Buncombe T. Co.* 119

SALE.

Vide *Fraud*, 6.

SATISFACTION.

Vide *Legacies*, 3, 4. *Trust*, 1.

SCIRE FACIAS.

1. Where a decree was made for the payment of money against an administrator, and it was ascertained by the decree that he had no assets—*held*, HENDERSON, Chief-Justice, *dissentiente*, that a *sci. fa.* under the act of 1784 (*Rev. C.* 226) is confined to judgments at Law; and that the only remedy for the Plaintiff was by a bill against the heirs, to have satisfaction out of the real assets.—*Jeffreys* v. *Yarborough*, 510

SET-OFF.

1. Where the Plaintiff and Defendant have mutual judgments in different Courts, and the Defendant is insolvent, a set-off will be allowed in Equity. *Iredell* v. *Langston*, 396

Vide *Trust*, 14.

SLAVES.

1. The second *proviso* of the third section of the act of 1806 (*Rev.* 701) respecting parol gifts of slaves, applies to the whole act, and is prospective in its operation. *Stallings* v. *Stallings*, 298

2. By that *proviso*, parol gifts of slaves to children are validated by the death and intestacy of the

parent, without resuming the possession, and become effectual, from the time the slaves were delivered to the children. *Id.* 298

3. Where slaves were delivered to a child, and remained in his possession until the death of the parent intestate, it was held to be an advancement at *the time of delivery*, and the subsequent increase was not to be valued in making distribution of the parent's property, nor to be taken as an advancement to the child. *Id.* 298

4. Slaves can only be held as property; and conveyances, having for their object either their emancipation or a qualified state of slavery, are against public policy, and a trust results to the donor or his executor. *Stevens* v. *Ely*, 497

5. As where slaves were conveyed in trust to permit them to live together, and be industriously employed, and that the donee should exercise a control over their morals and furnish them with necessaries—*held*, that upon the face of the deed (Hall, Judge, *dissentiente*,) as the slaves were not considered the property of the donee, a trust resulted to the executor of the donor, and a conveyance of the legal title was directed to be made to him. *Id.* 497

Vide *Gift*, 1. *Administrators*, 4, 14.

SPECIFIC PERFORMANCE.

1. A bill in the alternative, either for a specific performance of a parol contract, or a re-payment of the purchase-money, is not sustained by Courts of Equity, because, if the contract be avoided, the money may be recovered at Law. *Ellis* v. *Ellis*, 402

2. But upon a bill for a specific performance, which has been refused, where, from peculiar circumstances, the Plaintiff cannot at Law recover back his purchase-money, its re-payment is decreed. *Id.* 402

Vide *Statute of Frauds*, 1, 2. *Contracts*, 1.

STATUTES COMMENTED UPON.

1715, c. 2, Benzein, *v.* Lenoir, 225
Benzein *v.* Robenett, 448
c. 7, Pike *v.* Armstead, 110
c. 10. Bailey *v.* Shannonhouse, 416
Cooke *v.* Streator, 374
Collier *v.* Poe, 55
1784, c. 226, Jeffreys *v.* Yarbrough, 506
1787, c. 274, Wynne *v.* Tunstall, 23
1788. c. 284, Dunn *v.* Holloway, 322
1799, c. 522, Kimbrough *v.* Davis, 71
Flintham *v.* Holder, 349
1806, c. 701, Stallings *v* Stallings, 298
1812, c. 830, Harrison *v.* Battle, 537
c. 847, Bryan *v.* Bryan, 47
Dozier's Heirs, 118
1814, c. 869, Collier *v.* Collier, 358
1818, c. 962, Lee *v.* Norcom, 372
1819, c. 1016, Wall *v.* Scales, 472
Ellis *v.* Ellis, 180, 345
1820, c. 1037, Smith *v.* Washington, 318

STATUTE OF FRAUDS.

1. Where the Plaintiff seeks specific performance of an agreement for the sale of lands, and the Defendant denies the contract as alleged, and relies upon the statute, (1819, *Rev. c.* 1016) parol evidence cannot be received, even upon the ground of part performance, to show the contract. *Ellis* v. *Ellis*, 345

2. Whether if the contract so partly performed were admitted by the answer, the execution of it could be decreed since the statute? *Qu. Id.* 345

3. The act of 1819 (*Rev. c.* 1016) respecting parol contracts for the sale of lands and slaves, and the statute of frauds, (29 *Charles, c.* 2) were made to effect the same object, and [illegible] should receive the same construction. *Ellis* v. *Ellis*, 180

4. And where the whole purchase money was paid and possession delivered according to the contract, although no note in writing was made of it, a specific execution was decreed. *Id.* 180

STATUTE OF LIMITATIONS.

1. The statute of limitations does

not apply as between bailor and bailee, and the latter cannot, by denying the bailment and claiming against the bailor, make his possession adverse. *Collier* v. *Poe*, 55

2. Where letters of administration upon the estate of a deceased debtor never have issued, and after more than seven years from the death of the intestate, assets come to his heirs—it was held, upon a bill filed by a creditor setting forth these facts, and praying to have his debt paid out of the assets lately come to the possession of the heirs, that the act of 1715 (*Rev. c.* 10) was a bar to the debt.—*Cook* v. *Streator*, 328

3. To a bill against the executors of an executor, by the legatees of the first testator, a plea of the act of 1715 (*Rev. c.* 2) barring claims against dead men's estates, unless made within seven years, is not available, without an averment that the residue of the estate had been paid to the Trustees of the University.—*Bailey* v. *Shannonhouse*, 420

4. It seems that if a Defendant in Equity intends to rely upon the statute of limitations, it must be pleaded.—*McNair* v. *Ragland*, 537

5. Whether accounts between copartners are in any case barred by the statute of limitations?—*Qu. Id.* 537

6. But where there is an agreement between copartners under seal, to account, a bill for an account is not barred, before an action on the covenant would be.—*Id.* 537

Vide *Bill of Interpleader*, 2. *Mortgage*, 6.

SUBSTITUTION.

Vide *Creditors*, 4. *Bills of Exchange*, 2. *Mortgage*, 3, 4, 5. *Sureties*, 4. *Trust*, 2, 3.

SUPPLEMENTAL BILL.

Vide *Sci. Fa.* 1.

SURETIES.

1. The order in which parties to a security are liable at Law, is the order in which, independently of contract, they will be held bound in Equity.—*Smith* v. *Smith*, 173

2. In Equity, however, by a contract, the endorser may be made accountable to the maker, and the acceptor to the drawers, *Id.* 173

3. Where A, a surety, signed the note of B, payable to C, and it was endorsed by C at the request of and for the accommodation of B, there being no contract between A and C, whereby they agreed to become co-sureties of B, *held*, that A had no right to contribution from C. *Id.* 173

4. Where the administrator and one of the sureties to the administration bond, were next of kin to the intestate, and upon a suit on the bond by an administrator *de bonis non*, a stranger, also a surety, was alone subjected, *held* that he had a right in Equity to retain the share of the principal to indemnify him in full, and that of his co-surety to equalize the loss. And that having satisfied the judgment, he had, in Equity, a right to recover back the shares of his principal and co-surety.—*Norfleet* v. *Cotton*, 338

Vide *Creditors*, 1, 3, 5, 6, 7. *Bills of Exchange*, 2.

TAXES.

Vide *Widows*, 1.

TENANCY IN COMMON.

Vide *Executors and Administrators*, 2. *Legacies*, 7. *Partners*, 1.

TREATIES.

Vide *Confiscation Acts*, 1, 2.

TRUST.

1. Satisfaction of an open trust is not presumed from lapse of time; but a settlement between the trustee and *cestui que trust* changes the character of the trust, and subjects it to the presumption of satisfaction. Therefore were a settlement was made between an administrator and an infant distributee nearly of age, and not afterwards disaffirmed by the infant, it was held, that the lapse of twen-

ty-two years raised the presumption of satisfaction. —*Petty* v. *Harman*, 191

2. *Dictum*, *per* Henderson, Chief-Justice, the case of *Falls* v. *Torrance* was decided upon the ground that the trust was an open one, and never had been closed.—*Id.* 191

3. A trust being an incident of the legal estate in the land, is of necessity destroyed by whatever destroys or suspends the legal estate. Therefore the lord by escheat, the abator, intender, disseisor, &c., are not subject to a trust. *Benzein* v. *Lenoir*, 225

4. An equity of redemption is not a trust, but is a right inherent in the land, and charges all who take the land, although coming in the post and by title paramount. *Id.* 225

5. The doctrine of execution *cy prés* does not prevail in this State, and if the intention of a testator cannot be literally fulfilled, a trust results for the heir or next of kin.—*McAuley* v. *Wilson*, 276

6. Where a testator bequeathed property in trust, for the support of a minister of the Associate Seceding party "who shall preach at the Seceding Congregation meeting house called Gilead," and a majority of that congregation being of a differens denomination, refused to permit a minister of the Associate Seceding party to officiate in their church; it was held, that a trust resulted, although the Associate Seceding party offered to build a church near the one mentioned by the testator. *Id.* 276

7. Where a testator directed his land to be sold, and the proceeds applied to a purpose which failed, *held* there being no evidence of an intent to convert the land out and out into money, that a trust resulted to the heir at law, notwithstanding a residuary clause, bequeathing "any other thing not mentioned in this my last will."—*Henderson* v. *Wilson*, 313

8. A conveyance of a *chose* in action, in trust to pay a debt, is within the act of 1820, (*Rev. c.* 1037) and unless registered within six months of its date, is void against a subsequent *bona fide* assignee without notice. *Smith* v. *Washington*, 322

9. When no rule for the management of a trust estate is prescribed by the creator of it, the law enjoins good faith; by which is meant honesty and diligence carefully applied—and a departure from the rule prescribed by the creator, or a failure in good faith, is a breach of trust for which the trustee is liable —*Hester* v. *Hester* 332

10. Where a testator directed his debts to be collected, and a tract of land to be sold; and with the fund thus created, a residence for his family to be purchased—but the executors purchased to an amount exceeding the fund, and in the exercise of good faith, refused an advantageous offer for the land—*held*, that they had been guilty of a breach of trust only in exceeding the amount of the trust fund, and the purchase being divisible they were decreed to hold the excess on their own account. *Id.* 332

11. Equity always compels the trustee to surrender the legal estate to the *cestui que trust*, unless the receipt of the profits by the trustee is necessary to effectuate the intention of the creator of the trust.—*Jasper* v. *Maxwell*, 361

12. Where a testator bequeathed bank stock to his executor, in trust, to pay the dividends to his daughter for life; and upon the expiration of the charter of the Bank, gave the same shares absolutely to his daughter without any limitation over—*held*, that the daughter took the stock absolutely, and that her administrator had a right to call for a transfer of it. *Id.* 361

13. Where a husband received with his wife a large personal estate in possession during the coverture, and induced her to join him in the conveyance of her land to a third person, who re-conveyed it to the husband, and the conveyance and re-conveyance were designed only to vest the fee in the husband—*held*, upon a bill filed by the husband as administrator of the wife, to recover chattels of which she was the *cestui que*

trust, that the children of the wife by a former marriage had no equity to prevent his obtaining the legal title of those chattels.—*Id.* 361

14. S. C. by his will gave legacies to the children of J. C. The children died intestate, leaving their father the next of kin. The executor of S. C. having obtained a decree against J. C. for a mortgage debt, died, and appointed the Plaintiffs his executors. J. C. died also insolvent, leaving the debt unpaid; and the Defendant having administered on the estates of the children of J. C. upon a petition in the County Court, obtained a decree for their legacies against the Plaintiffs, who thereupon brought their bill to set off the decree in favor of their testator against that for the legacies, alleging that there were no debts due from the estates of the children of J. C., and that his estate was beneficially entitled to the whole of the legacies. *Held*, that the Plaintiffs were entitled to the relief sought, which was nothing more than subjecting the funds of an insolvent *cestui que trust*, in the hands of his trustee, to the payment of his debts. *Iredell* v. *Langston*, 396

15. A fraudulent trustee, who, pending a litigation between him and his *cestui que trust*, purchases the trust estate at a Sheriff's sale, acquires thereby no title, and the Sheriff's deed to him can stand only as a security for the amount of his bid. *Keaton* v. *Cobb*, 443

16. Where the *cestui que trust* incurs costs at Law in defending a title purely equitable, against his trustee, and does not at once come into the proper forum for redress, he cannot in Equity recover his own costs at Law; but he is entitled to a re-payment of the amount of costs paid to the trustee. *Id.* 443

17. *Dictum, per* HENDERSON, Chief-Justice.—Where the legal estate passes, trusts annexed to it, which are either illegal or impolitic, are avoided, and a trust declared for the donor, or the donee declared to hold, discharged of any trust, as will best tend to suppress the illegal purpose. *Stevens* v. *Ely*, 497

18. *Dictum, per* HENDERSON, Chief-Justice.—In a will, estates are created by the intent of the devisor, however expressed; but to the creation of the same estate by deed, certain technical words are necessary. But when the estates are created, whether by deed or will, they possess similar qualities; and the same circumstances will in one case cause a trust to result to the heir, and in the other to the grantor. *Id.* 497

19. Under the first section of the act of 1811 (*Rev. C.* 830) subjecting trust estates to execution, only such estates as are held in trust for the Defendant in the execution solely, are within the operation of the act. As the Sheriff's deed transfers the estate of both the trustee and *cestui que trust*, those cases where it is necessary, for the purposes of the trust, that the trustee should retain the legal estate, are not within its operation. As in case of a conveyance to sell and pay debts, and then in trust for the bargainor, the estate of the trustee is not destroyed by an execution sale of the interest of the *cestui que trust*. *Harrison* v. *Battle*, 541

20. But the interest of the bargainor, after payment of the debts, being in no respect distinguishable from an equity of redemption, may be sold under the second section of the act. *Id.* 541

21. That section subjects equities of redemption in *law* only to execution sales. The same interest in chattels is left as at common law, and can be subjected to the satisfaction of an execution, only in a Court of Equity. *Id.* 541

22. Where lands and slaves were conveyed, in trust to pay debts, with a resulting trust in favor of the bargainor, and after its execution the bargainor made further

assignments of the resulting trust, to secure debts, and judgments were also recovered against him—*held*, that executions bound the resulting trust in the land from the *teste*; and if they overreached the assignments, had a priority; and that as to the resulting trust in the slaves, it was bound in Equity in favor of the creditor who first filed his bill, without reference to the *teste* of his execution; and that assignments made before the filing of the bill had a preference. *Id.* 541

23. Creditors secured by the deed upon land and slaves, are in favor of the execution creditors, having a lien upon a resulting trust in the land, marshalled so as to have their debts satisfied, *pro tanto*, by a sale of the slaves *Id.* 541

Vide *Fraud*, 2, 3. *Lapse of Time*, 1, 3. *Possession*, 1. *Agreement*, 4, 5. *Slaves*, 4, 5. *Interest*, 3.

TRUSTEE.

Vide *Trust.*

TRUSTEES OF THE UNIVERSITY.

Vide *Statute of Limitations*, 3.

USURY.

1. Wherever the debtor, by the terms of the contract, can avoid the payment of a larger by the payment of a smaller sum at an earlier day, the contract is not usurious. *Moore* v. *Hylton*, 433
2. In such case, the larger sum becomes a penalty, against which Equity will relieve. *Id* 433
3. Where the holder of a bond for the payment of a certain sum promises to surrender the bond, upon the payment of a less sum at an earlier day, to take advantage of such promise, there must be a strict compliance on the part of the obligor. *Id* 433
4. To constitute usury, the obligation to pay more than legal interest must be absolute upon its face. *Id*, 433

VENDOR AND VENDEE.

Vide *Fraud*, 1, 2. *Lien*, 1. *Mortgage*, 3, 4, 5. *Fraud*, 6.

VOLUNTARY CONVEYANCES.

1. Defective voluntary conveyances are not aided by a Court of Equity; but rights vested under them are protected. *Dawson* v. *Dawson*, 93
2. Where a tenant in common of slaves voluntarily conveyed all of a particular kind, which might fall to his share upon a division, and then fraudulently contrived that none of that kind should be allotted to him—a division, made with this fraudulent intent, was held to be inconsistent with the rights which the deed vested in the donees. *Id.* 93
3. Volunteers, who claim under a deed of gift, executed under the impulse of feeling, rather than the convictions of the understanding in which apparently the grantor did not exercise perfect free will, are not aided in a Court of Equity. *Dawson* v. *Alston*, 400
4. If a voluntary deed, fairly obtained, is destroyed by the donor before registration, a Court of Equity will compel him to convey the same property to the donee. *Tolar* v. *Tolar*, 460

Vide *Lien*, 3.

VOLUNTEERS.

Vide *Marriage Settlement*, 5. *Voluntary Conveyances*, 3.

WILLS.

1. A Plaintiff who claims under a will, which is not admitted in the answer, must produce it, or a copy of it at the hearing, or account for its loss. *Thompson* v. *Applewhite*, 464
2. One who claims under a will which is not established, must have all the persons interested to contest it before the Court. *Id.* 464

Vide *Legacies*, 5, 6, 7, 8, 9, 10. *Parol Evidence*, 1. *Residuary Clause*, 1.

WIDOWS.

1. A widow, who, after the death of her husband, occupies his residence, his children, some of them of age, living with her, is under no obligation to pay the taxes accruing thereon, between his death and the assignment of her dower. *Branson* v. *Yancy*, 77

2. Therefore, a purchase by her of the premises, for such taxes, made after the assignment of dower, without actual fraud, will not be set aside in favor of her husband's creditors. *Id.* 77

Vide *Agreement*, 2.

This book must
not be taken
from the building